CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 **JULY 10, 1996** **NO. 28**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

19 CFR Parts 102 and 134

COUNTRY OF ORIGIN MARKING EXCEPTION FOR TEXTILE GOODS ASSEMBLED ABROAD WITH COMPONENTS ONLY CUT TO SHAPE IN THE U.S.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General policy statement.

SUMMARY: This notice advises the public of a general country of origin marking exception that will be granted by Customs, commencing July 1, 1996, for imported textile goods assembled abroad with components which were only cut to shape in the United States.

EFFECTIVE DATE: July 1, 1996.

FOR FURTHER INFORMATION CONTACT: Craig Walker, Special Classification and Marking Branch, Office of Regulations and Rulings (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 5, 1995, Customs published in the Federal Register (60 FR 46188) a final rule document setting forth, in section 102.21, Customs Regulations (19 CFR 102.21), new rules of origin applicable to textile and apparel products. These rules, which become effective July 1, 1996, implement the provisions of section 334 of the Uruguay Round Agreements Act ("the Act") (codified at 19 U.S.C. 3592).

One of the fundamental changes that will result from the new textile rules of origin is that cutting fabric to shape will no longer confer origin. Currently (prior to July 1, 1996), the cutting of foreign fabric to shape in the U.S. results in the components becoming products of the U.S. If these components are assembled abroad and returned, they are entitled to a duty allowance under subheading 9802.00.80, HTSUS, and pursuant to the regulations (19 CFR 10.22, which will be eliminated effective August 5, 1996), they may be marked "Assembled in X country from U.S. components" or a similar phrase. However, under the new textile

rules, these fabric components will no longer be of U.S. origin. Therefore, while the Act provides that importers may continue to receive a duty allowance for components cut to shape in the U.S. from foreign fabric and assembled abroad, effective July 1, 1996, such assembled goods will no longer be considered properly marked when they are labeled "Assembled in X country from 'U.S.' components."

However, the marking statute and regulations allow for exceptions to the marking requirements under certain circumstances. One of these exceptions concerns articles which cannot be marked prior to, or after, importation except at an expense that would be economically prohibitive. See 19 U.S.C. 1304(a)(3)(C) and (K), and 19 CFR 134.32(c) and (o). In consideration of: (1) the fact that many labels for assembled goods were already printed prior to July 1, 1996, on the basis of the current textile origin rules; (2) the expectation that many individual requests will be received for marking exceptions on the ground of economic prohibitiveness; and (3) the importance of providing uniformity of Customs treatment for such goods, Headquarters has made a general finding that it would be economically prohibitive to properly mark goods (either before or after importation) with respect to which marking labels have already been pre-printed or/or sewn into goods based on the current origin rules. This action will allow importers to exhaust their inventory of pre-existing labels stating "Assembled in X country from U.S. components" or a similar phrase, for goods that were assembled from components that were only cut to shape in the U.S. (i.e., not woven in the U.S.). This general marking exception shall be granted for all imported goods marked as described above for a period not to exceed four (4) months from the effective date of the new textile rule of origin (i.e., no later than November 1, 1996) which Customs views as a reasonable period of time for the exhaustion of existing inventory of labels. Please note that, if information is obtained that the above labels were printed after July 1, 1996, this general marking exception will not apply.

Dated: June 21, 1996.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, June 26, 1996 (61 FR 32924)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 25, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF VACUUM TANK TRUCKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two rulings pertaining to the tariff classification of vacuum tank trucks. Notice of the proposed revocations was published May 15, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 20.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 9, 1996.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Tariff Classification Appeals Division, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 15, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 20, proposing to revoke Headquarters Ruling Letter (HQ) 087028, issued on August 13, 1990, and HQ 087143, issued on August 15, 1990, which concerned the classification of vacuum tank trucks under subheading 8704.90.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other motor vehicles for the transport of goods. No comments were received in response to this notice.

Subheading 8704.90.00, HTSUS, is the "basket" provision for motor vehicles for the transport of goods. If motor vehicles for the transport of goods are (1) dumpers designed for off-highway use; (2) powered by compression-ignition internal combustion piston engines (diesel or semi-diesel) or (3) powered by spark-ignition internal combustion engines, they cannot be classified under subheading 8704.90.00, HTSUS.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking HQ 087028 and HQ 087143 to reflect the proper classification of vacuum tank trucks under one of the following subheadings, depending on which of the following categories the vehicle falls: (1) those powered by diesel engines are classifiable under subheading 8704.21.00 (gross vehicle weight ("G.V.W.") not exceeding five metric tons), 8704.22.50 (G.V.W. exceeding five metric tons but not exceeding 20 metric tons) or 8704.23.00 (G.V.W. exceeding 20 metric tons), HTSUS; and (2) those powered by spark-ignition internal combustion engines are classifiable under subheading 8704.31.00 (G.V.W. not exceeding five metric tons) or 8704.32.00 (G.V.W. exceeding five metric tons), HTSUS. HQ 958847 revoking HQ 087028 and HQ 087143 is set forth in an Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: June 20, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 20, 1996.

CLA–2 RR:TC:MM 958847 LTO
Category: Classification
Tariff No. 8704.21.00, 8704.22.50,
8704.23.00, 8704.31.00, and 8704.32.00

PORT DIRECTOR
U.S. CUSTOMS SERVICE
111 West Huron Street
Room 603
Buffalo, NY 14202

Re: IA 3/96; Vacuum tank trucks; HQs 087028, 087143 *revoked.*

DEAR PORT DIRECTOR:

The following is our decision regarding IA 3/96, which concerns the classification of vacuum tank tracks under the Harmonized Tariff Schedule of the United States (HTSUS). In HQ 087028, dated August 13, 1990, and HQ 087143, dated August 15, 1990, Customs classified nearly identical vacuum tank trucks.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocations of HQ 087028 and HQ 087143 was published May 15, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 20. No comments were received.

Facts:

The Presvac Systems Ltd. vacuum tank trucks are liquid waste removal systems that consist of a vacuum tank with pump mounted on a truck chassis. The trucks are designed to pick up and transport a variety of liquid wastes, slurries, industrial spills and hazardous liquids. The trucks are generally powered by compression-ignition internal combustion (diesel) engines, although, in limited cases, they are powered by spark-ignition internal combustion piston engines.

Issue:

Whether the vacuum tank trucks are classifiable under subheading 8704.90.00, HTSUS, which provides for other motor vehicles for the transport of goods.

Law and Analysis:

The General Rules of Interpretation to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

The vacuum tank trucks are classifiable within heading 8704, HTSUS, which provides for motor vehicles for the transport of goods. However, the following subheadings, at the five-digit level, remain under consideration:

8704.2	Other, with compression-ignition internal combustion piston engine (diesel or semi-diesel)
8704.3	Other, with spark-ignition internal combustion piston engine
8704.9	Other

In HQ 087028, dated August 13, 1990, and HQ 087143, dated August 15, 1990, Customs classified nearly identical vacuum tank trucks under subheading 8704.90.00, HTSUS. Subheading 8704.9, HTSUS, covers motor vehicles for the transport of goods other than (1) dumpers for off-highway use (subheading 8704.1, HTSUS), (2) those powered by compression-ignition internal combustion engines (diesel or semi-diesel) and (3) those powered by spark-ignition internal combustion piston engines. For example, subheading 8704.9, HTSUS, would encompass motor vehicles for the transport of goods, other than dumpers for off-highway use, which are powered by electricity, propane, steam, etc.

The subject trucks are generally powered by compression-ignition internal combustion (diesel) engines, although, in limited cases, they are powered by spark-ignition internal

combustion piston engines. They are never powered by an alternative source of power or engine design. Accordingly, the trucks cannot be classified under subheading 8704.90.00, HTSUS. Those powered by diesel engines are classifiable under subheading 8704.21.00 (gross vehicle weight ("G.V.W.") not exceeding five metric tons), 8704.22.50 (G.V.W. exceeding five metric tons but not exceeding 20 metric tons) or 8704.23.00 (G.V.W. exceeding 20 metric tons), HTSUS, while those powered by spark-ignition internal combustion engines are classifiable under subheading 8704.31.00 (G.V.W. not exceeding five metric tons) or 8704.32.00 (G.V.W. exceeding five metric tons), HTSUS. HQ 087028 and 087143 are revoked.

Holding:

The vacuum tank trucks powered by diesel engines are classifiable under subheading 8704.21.00, 8704.22.50 or 8704.23.00, HTSUS, while those powered by spark-ignition internal combustion engines are classifiable under subheading 8704.31.00 or 8704.32.00, HTSUS.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

This decision should be mailed by your office to the internal advice requester no later than 60 days from the date of this letter. On that date, the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and the public via the Diskette Subscription Service, Freedom of Information Act and other public access channels.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 96–98)

GKD-USA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–02–00137

Plaintiff, GKD-USA, Inc. ("GKD"), moves for summary judgment pursuant to Rule 56 of the Rules of this Court challenging the United States Customs Service's ("Customs") classification of its merchandise, polyester filter belting in material lengths, as straining cloth of a kind used in oil presses or the like, pursuant to subheading 5911.40.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Defendant opposes plaintiff's motion and cross-moves for summary judgment pursuant to Rule 56 of the Rules of this Court.

Held: Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment is granted. Customs properly classified the subject merchandise, polyester filter belting in material lengths, as straining cloth of a kind used in oil presses or the like, pursuant to subheading 5911.40.00 of the HTSUS.

[Plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment is granted; judgment is entered for defendant. Case dismissed.]

(Dated June 17, 1996)

Sandler, Travis & Rosenberg, P.A. (Leonard L. Rosenberg and *Paul Giguere)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Bruce N. Stratvert);* of counsel: *Laura R. Siegel,* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff, GKD-USA, Inc. ("GKD"), moves pursuant to Rule 56 of the Rules of this Court for summary judgment on the ground that there is no genuine issue as to any material facts. Defendant cross-moves for summary judgment seeking an order dismissing this case.

GKD challenges the denial of Protest No. 1801–92–100023 by the United States Customs Service ("Customs"). The issue presently before the Court is whether Customs properly classified the merchandise, polyester filter belting in material lengths, as straining cloth of a kind used

in oil presses or the like pursuant to subheading 5911.40.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The entry numbers at issue are 032–01647884 and 032–01665175.

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994).

BACKGROUND

GKD imported polyester filter belting through the port of Tampa, Florida on the dates of November 5, 1991, and December 26, 1991. Customs classified the imported merchandise under subheading 5911.40.00, HTSUS, subject to a duty rate of 17% *ad valorem*. On March 19, 1992, Customs issued Headquarters Ruling Letter ("HRL") 950284, holding that sludge filtering belts imported in material lengths are classifiable under subheading 5911.40.00, HTSUS. Pl.'s Mem. Supp. Mot. Summ. J., Exhibit G at 5. In reaching its decision, Customs stated that the subject merchandise is not precluded from classification under subheading 5911.40.00, HTSUS, merely because it is not used in oil presses. Customs stated that the language "or the like" contained in subheading 5911.40.00, HTSUS, indicates that the drafters of the tariff schedule intended the term "straining cloth" to include a broader range of articles than those used in oil presses. *Id.* at 3–5. Customs further found that the terms "straining cloth" and "filtering" cloth or belt are synonymous "as evidenced by the common usage of the word 'strain' and the identical functions of straining cloths and filtering cloths or belts." *Id.* at 4. Customs concluded that "[t]here is no fundamental difference in the filtering function of the instant merchandise" as compared with oil presses, sugar refineries and breweries. *Id.* at 5.

On May 19, 1992, GKD timely filed Protest No. 1801–92–100023 claiming that Customs should have classified the subject entries under subheading 5911.90.00, HTSUS, at a duty rate of 7.5%. Customs denied the Protest on September 2, 1993, and this action ensued.

The relevant portion of the HTSUS is as follows:

5911	Textile products and articles, for technical uses, specified in note 7 to this chapter:
5911.10	Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes:
5911.10.10	Printers' rubberized blankets
5911.10.20	Other
5911.20	Bolting cloth, whether or not made up:
5911.20.10	Fabrics principally used for stenciling purposes in screen-process printing
	Other:
5911.20.20	Of silk
5911.20.30	Other
	Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or simi-

	lar machines (for example, for pulp or asbestos-cement):
5911.31.00	Weighing less than 650 g/m^2
	Press felts
	Dryer felts and dryer fabrics
	Other * * *
5911.32.00	Weighing 650 g/m^2 or more
	Press felts
	Dryer felts and dryer fabrics
	Other * * *
5911.40.00	Straining cloth of a kind used in oil presses or the like, including that of human hair
5911.90.00	Other
	Cords, braids and the like of a kind used in industry as packing or lubricating material
	Other

Customs claims that the subject merchandise was properly classified pursuant to subheading 5911.40.00, HTSUS, subject to a duty rate of 17%. GKD contends that the merchandise should have been classified under subheading 5911.90.00, HTSUS, subject to a duty rate of 7.5%.

UNDISPUTED FACTS

The parties agree that there is no genuine dispute as to any material fact. Pl.'s Mem. Supp. Mot. Summ. J. at 1; Def.'s Mem. Supp. Mot. Summ. J. at 7–8. GKD imports polyester filter belting material constructed by weaving monofilament fibers having cross-sectional dimensions of less than 1.0 millimeter into various weave patterns. The merchandise contains one layer of fabric.[1] The subject merchandise is imported in rolls or bolts of material commonly known in the trade as piece goods. The merchandise is not imported cut to size or in the piece marked with lines of demarcation for particular sizes. GKD also imports filter belts for rotary drum vacuum filters, horizontal vacuum filters and belt dryers. The merchandise at issue is a textile product for technical uses as specified in note 7 to Chapter 59 of the HTSUS.[2] While the

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[1] While both parties agree that the merchandise contains only one layer of fabric, there is a dispute as to whether the merchandise may be described as a fabric with "multiple warp or weft" as those terms are commonly and commercially used. *See infra* at 11–12.

[2] Note 7, Chapter 59 of the HTSUS states as follows:

Heading 5911 applies to the following goods, which do not fall in any other heading of section XI:

(a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:

(i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes;

(ii) Bolting cloth;

(iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;

(iv) Flat woven textile fabrics with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;

(v) Textile fabric reinforced with metal, of a kind used for technical purposes;

(vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;

(b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

principal use of the subject merchandise is in water waste treatment machinery, filter presses are used for filtering or clarifying many liquids.

DISCUSSION

On a motion for summary judgment, it is the function of the court to determine whether there remain any genuine issues of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Once the court determines that no genuine issue of material fact exists, summary judgment is properly granted when the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States,* 812 F.2d 1387 (Fed. Cir. 1987). The meaning of a tariff term is a question of law to be decided by the court, whereas the determination of whether a particular article fits within that meaning is a question of fact. *Hasbro Indus., Inc. v. United States,* 879 F.2d 838, 840 (Fed. Cir. 1989). In the case at bar, this Court finds there are no genuine issues of material fact, the dispositive issues to be resolved are legal in nature and, therefore, summary judgment is proper.

In accordance with 28 U.S.C. § 2640(a) (1994), Customs' classification is subject to *de novo* review by this Court. The Court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States,* 733 F.2d 873, 878 (Fed. Cir. 1984). Customs improperly relies upon the statutory presumption of correctness pursuant to 28 U.S.C. § 2639(a)(1) (1994). *See* Def.'s Mem. Supp. Mot. Summ. J. at 15–16. The United States Court of Appeals for the Federal Circuit has recently held that when there is "no factual dispute between the parties, the presumption of correctness is not relevant." *Goodman Mfg., L.P. v. United States,* 69 F.3d 505, 508 (Fed. Cir. 1995). In the summary judgment context, where the issues to be resolved are legal in nature, and there are no genuine issues of material facts before the court, Customs' classifications are not presumed to be correct. Accordingly, the Court must determine whether Customs correctly classified the merchandise at issue.

When a tariff term is not clearly defined in either the HTSUS or its legislative history, the correct meaning of the term is generally resolved by ascertaining its common and commercial meaning. *W.Y. Moberly, Inc. v. United States,* 924 F.2d 232, 235 (Fed. Cir. 1991). In order to determine the common meaning of a tariff term, the court may rely on its own understanding of the term, as well as consult dictionaries, lexicons and scientific authorities. *Brookside Veneers, Ltd. v. United States,* 847 F.2d 786, 789 (Fed. Cir.), *cert. denied,* 488 U.S. 943 (1988).

GKD argues that Customs erred by classifying the filter press belting under subheading 5911.40.00 because filter press belting is not like straining cloth of a kind used in oil presses. According to GKD, filter press belting contains significantly different filtering properties than straining cloth used in oil presses. To illustrate its point, GKD states that straining cloth used in oil presses has small mesh openings with a size of an upper limit of 10 microns, whereas filter press belting gener-

ally has mesh openings of a size ranging from 140 to 155 microns. Pl.'s Mem. Supp. Mot. Summ. J. at 2. Based on the size of the openings, GKD argues that Customs improperly characterized the product in issue as featuring a "close weave." *Id.* at 20–21. GKD also points out that straining cloth of a kind used in oil presses is usually manufactured of multifilament yarns while filter press belting is manufactured of monofilament yarns. *Id.* at 2.

GKD also focuses on the machines upon which the fabrics are used as being the principal distinguishing feature in the tariff provisions. Specifically, GKD insists that papermaking and similar machines (on which the subject merchandise is used) differ from oil presses and similar machines. *Id.* at 16. According to GKD, heading 5911, HTSUS, separates fabrics, endless or fitted with linking devices, of a kind used in papermaking machines from straining cloth of a kind used in oil presses or the like. *Id.* (referring to subheadings 5911.31.00 and 5911.32.00, HTSUS). GKD asserts that by classifying certain fabrics as being "of a kind used in papermaking machines" separately from "straining cloth of a kind used in oil presses," the drafters of the tariff schedule intended the machines on which the fabrics are used to be the principal distinguishing feature. Pl.'s Mem. Supp. Mot. Summ. J. at 16–17. GKD explains that oil presses typically use filter plates as opposed to belts. GKD describes filter plates as being mounted on a static frame and used until clogged. *Id.* at 21–22. GKD contrasts filter plates with belt filter presses which process sludge on a continuous basis on moving endless belts. GKD emphasizes that static filter plates and frames are not generally used for sludge dewatering machinery. *Id.* at 23.

GKD further maintains that Customs improperly relied on the Explanatory Notes to the HTSUS. GKD insists that the Explanatory Notes are not legally binding as they are intended only as an aid in the interpretation of the HTSUS. According to GKD, Customs erroneously used the Explanatory Notes to expand the coverage of subheading 5911.40.00. *Id.* at 24–25.

Defendant responds that the plain language of the HTSUS compels classification of the imported merchandise under subheading 5911.40.00. Defendant focuses on the language "of a kind" arguing that the merchandise at issue consists of woven textile fabric used for a similar technical purpose to that of straining cloth used in oil presses. Def.'s Mem. Supp. Mot. Summ. J. at 16–17. According to defendant, the term "straining cloth" encompasses filter media, composed of textile material (or of human hair), "whose essential and determinate characteristic/purpose is to perform a filtration operation." *Id.* at 17–18.

Defendant claims that the essential purpose and function of the imported merchandise is to filter out particulate matter from a fluid. In addition, defendant submits that the language "of a kind" and "or the like" is intended to exclude filter media utilized in non-textile filter types. *Id.* at 20–21. Defendant further contends that language "of a kind" and "or the like" appearing in the tariff provision conveys an

expansive meaning to textile filtration materials used in various apparatus to filter out solids from fluids. *Id.* at 21–22.

Finally, defendant contends that the imported merchandise is not classifiable under subheading 5911.90.00 because it is not a woven textile fabric with multiple warp or weft as provided for in note 7(a)(iv) of Chapter 59. *Id.* at 24.

In response to defendant's motion for summary judgment, GKD disputes defendant's interpretation of the term "multiple warp or weft" as requiring multiple yarns in the warp and multiple yarns in the weft. GKD argues that the tariff provision does not mention warp yarns or weft yarns but, rather, only multiple warp or weft in a flat woven textile fabric. As such, GKD asserts that the plain meaning of the phrase as used in note 7(a)(iv) of Chapter 59 is the type or pattern of weave to be found in the fabric. Pl.'s Reply to Def.'s Mot. Summ. J. at 4–5.

GKD further responds that the term "or the like" relates to oil presses, not to straining cloth. Based on rules of grammatical construction, GKD insists that the provision at issue includes only straining cloth which has common traits with straining cloth used in oil presses and presses similar to oil presses. GKD also states that the filter belt material at issue is not classifiable under subheading 5911.40.00, HTSUS, because it is not similar in design, construction, function and use as straining cloth of a kind used in oil presses or the like. *Id.* at 10–15 (citing *QMS, Inc. v. United States,* 19 CIT ____, Slip Op. 95–65 (Apr. 18, 1995)).

Defendant rebuts GKD's arguments concerning the meaning of the phrase "multiple warp or weft." Essentially, defendant's position is that fabrics such as the merchandise at issue containing a single set of warp yarns and a single set of weft yarns are not of multiple warp and weft construction and, therefore, are not classifiable under subheading 5911.90.00, HTSUS. Def.'s Reply Mem. Supp. Mot. Summ. J. at 1–2.

The issue before the Court is whether the phrase "straining cloth of a kind used in oil presses or the like" includes the subject merchandise and, if not, whether the merchandise is properly classifiable pursuant to subheading 5911.90.00, HTSUS. The Court finds that there is no clearly stated Congressional intent as to the meaning of the tariff phrase "straining cloth of a kind used in oil presses or the like." As such, the Court must construe the tariff terms according to their current common and commercial meaning. To do so, this Court has consulted various lexicons, dictionaries and other reliable information sources for the common and commercial meaning of the phrase "straining cloth of a kind used in oil presses or the like." *See Brookside Veneers,* 847 F.2d at 789.

After consulting various dictionaries and encyclopedias, the Court has determined that "straining cloth" is generally referred to as "filter cloth." Filter cloth is one of the basic requirements for the process of filtration which is described as follows:

> [T]he process in which solid particles in a liquid or gaseous fluid are removed by the use of a filter medium that permits the fluid to pass through but retains the solid particles. Either the clarified fluid or

> the solid particles removed from the fluid may be the desired product. In some processes used in the production of chemicals both the fluid filtrate and the solid filter cake are recovered.
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> * * * * * * *
>
> The basic requirements for filtration are: (1) a filter medium; (2) a fluid with suspended solids; (3) a driving force such as a pressure difference to cause fluid to flow; and (4) a mechanical device called the filter that holds the filter medium, contains the fluid and permits the application of force. The filter may have special provisions for removal of the filter cake or other solid particles, for washing the cake and possibly for drying the cake. The various methods used for treating and removing the cake, for removing the clarified filtrate and for creating the driving force on the fluid have been combined in various ways to produce a great variety of filter equipment.

Encyclopedia Britannica 270 (1970).

Straining cloth is a type of filter medium required for the process of filtration. Filter media are classified in the following manner:

> **Filter Media.**—Filter media may be divided into two general classes: (1) the thin barrier, exemplified by a filter cloth, filter screen or the common laboratory filter paper; (2) the thick or en masse barrier, such as a sand bed, coke bed, porous ceramics, porous metal and the precoat of filter aid which is often used in the industrial filtration of fluids that contain gelatinous precipitates.
>
> A thin filter medium offers a single barrier in which the openings are smaller than the particles to be removed from the fluid. A single, thin filter medium usually is satisfactory if the layers of solid particles that accumulate on the medium produce a porous cake that is permeable to the fluid.

Id. One encyclopedia defines filter cloth as a "warp-effect, twill-weave fabric which varies much in weave, yarn count, texture, and weight. Finds much use in industry in the food, candy, paint, chemical, petroleum, and similar industries." *Encyclopedia of Textiles* 545 (2d ed. 1972). A more general definition of filter cloth describes it as a "fabric used as a medium for filtration." *McGraw-Hill Dictionary of Scientific and Technical Terms* 715 (4th ed. 1989). Based on these definitions, the Court concludes that the term "straining cloth" is intended to have a broad meaning. Used alone, the term "straining cloth" can apply to any fabric used as a medium for filtration.

The next issue is whether the meaning of "straining cloth" is limited by the phrase "of a kind used in oil presses or the like." An oil press is a machine that provides a mechanism to hold the filter medium and provides the force necessary to cause the fluid to flow. An oil press uses pressure to force the fluid to pass through the filter medium. In general terms, an oil press is a form of a "filter press" which is characterized as follows:

> The most common type of pressure filter with a filter cloth is known as a filter press. This is a batch-operated filter that is used

> when the filter capacities involved do not warrant investment in more expensive continuous pressure or vacuum filters. The plate-and-frame filter press requires the least floor space per unit of filtering area and usually involves the lowest capital cost per unit of area. However, since it is batch operated and must be loaded and unloaded manually the labour costs are high, particularly in the larger sizes. There are many different types of filter presses.

Encyclopedia Britannica at 270. Specifically, an oil press is a "press for expressing oil (as from nuts, olives, seeds)." *Webster's Third New International Dictionary* 1569 (1993). The process of "expressing" involves the "separation of liquids from solids by compressively squeezing certain liquid-containing substances, such as separating oils from vegetable seeds and nuts." *Van Nostrand's Scientific Encyclopedia* 1105–06 (7th ed. 1989). The press is "designed to permit the liquids to be removed while still retaining the solids between the compressing surfaces." *Id.* at 1106. One type of press used to express oil is a plate press in which the material to be expressed, such as fruit or seeds, is wrapped in plate cloths and then placed between a series of hydraulically operated plates. *Id.* Another type of press used to separate oil from vegetable seeds and nuts is a screw press which consists of "a continuous screw or worm that rotates within a cyclinder housing lined with perforated plates." *Id.* There are other presses used for mechanical expression such as roll presses used for sugar, can and wood products and low-pressure screw presses used for beverage products and wood. *Id.* Based on the above information, the Court interprets "oil presses or the like" to include the various presses described above which are all used to remove liquid and retain solids by creating a pressure differential. Thus, in order for the merchandise at issue to be properly classifiable under subheading 5911.40.00, HTSUS, it must be a filter cloth used on a press designed to separate liquids from solids through a change in pressure.

The filter cloth imported by GKD is generally used for municipal and industrial sludge dewatering machinery. Dewatering is the "[r]emoval of water from solid material by wet classification, centrifugation, filtration, or similar solid-liquid separation techniques." *McGraw-Hill Dictionary of Scientific and Technical Terms* at 521. The type of filter used for dewatering by way of filtration is a belt filter press. Belt filters are described as follows:

> These designs were introduced in the mid-1950's with the objective of lengthening the life of the filter-medium through the use of external washing on a continuous basis. Improvement of clarity of filtrate was also an objective * * *. Depending upon application and effectiveness of continuous washing, the filter medium will perform well over a period ranging from 6 weeks to 6 months, or even longer.
>
> Internal-feed drum filters accomplish filtration on the inside of the drum surface. With the feed on the inside, there is no need for an external slurry vat as with the conventional rotary drum. A pool of slurry is maintained in the bottom of the drum to a depth of several inches. When the formed cake approaches top center, the vacuum is

> cut off and a reverse, pulsating blow is applied to discharge the cakes to a chute or conveyor below.

Van Nostrand's Scientific Encyclopedia at 1148. While the initial feed in a horizontal belt press is achieved through gravity, the liquid and solids are ultimately separated due to a vacuum that is created. Thus, belt presses remove liquid and retain solids through the use of a pressure differential. The primary difference between an oil press and a belt filter press is the fact that oil presses operate on an intermittent basis while belt filter presses operate on continual basis.[3]

The next question, therefore, is whether a filter cloth used as a filter medium differs based on intermittent as opposed to continuous filtering. An explanation of the type of textile used for various filters states:

> In the selection of a filter fabric, many factors must be taken into consideration. These include type and cost of equipment and operation; solids retention and permeability requirements; heat, chemical, abrasion, and flex resistance; bursting strength; dimensional stability; ease of cleaning; and resistance to "blinding." This last term refers to the clogging and plugging of the filter cloth so that flow rate is seriously reduced.
>
> From a fabric standpoint, a like number of factors must be taken into consideration: fiber form such as monofilament, multifilament, spun staple; yarn size and twist; thread count; weave; and finish such as gray, preshrunk, scoured, calendered, heat stabilized, or resin finished.

Wellington Sears Handbook of Industrial Textiles at 268. The filter material at issue in this case consists of polyester filter belting material constructed by weaving monofilament fibers having cross-sectional dimensions of less than 1.0 millimeter into various weave patterns. The Explanatory Notes for heading 5911 provide the following description of the type of fabrics used as straining cloth:

> Straining cloth (e.g., woven filter fabrics and needled filter fabrics), whether or not impregnated, of a kind used in oil presses or for similar filtering purposes (e.g., in sugar refineries or breweries) and for gas cleaning or similar technical applications in industrial dust collecting systems. The heading includes oil filtering cloth, certain thick heavy fabrics of wool or of other animal hair, and certain unbleached fabrics of synthetic fibres (e.g., nylon) thinner than the foregoing but of a close weave and having a characteristic rigidity. It also includes similar straining cloth of human hair.

While the Explanatory Notes are not legally binding, they "are intended to clarify the scope of HTSUS subheadings and to offer guidance in

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[3] The Court rejects GKD's argument concerning the specific reference to paper making machinery in subheadings 5911.31.00 and 5911.32.00, HTSUS. The fact that the tariff schedule specifically refers to papermaking machinery in those subheadings does not support the position that the failure to refer to papermaking machinery in subheading 5911.40.00, HTSUS, precludes classification of the subject merchandise under that subheading. The material referred to in subheadings 5911.31.00 and 5911.32.00, HTSUS (textile fabrics and felts, endless or fitted with linking devices) are specifically used in the papermaking industry as "wet or press felts" or "dryer felts." *See Wellington Sears Handbook of Industrial Textiles* 276–77 (1963). These felts are actually referred to as "papermaking felts" and are considered "essential to the operation of paper making machinery." *Id.* at 276. In contrast, filter cloths are used in many industries. While the type of filter cloth used may vary according to the industry they are not as specifically tailored as the materials covered by subheadings 5911.31.00 and 5911.32.00, HTSUS.

interpreting subheadings." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994); *see also Totes, Inc. v. United States*, 69 F.3d 495, 500 (Fed. Cir. 1995). GKD's main contention concerning the definition of straining cloth provided in the Explanatory Notes is that the subject fabric is not of "close weave." GKD admits that most of the subject fabrics are composed of satin and twill weaves. Satin weave fabrics are described as a "*closely* woven fabric with a glossy face and a dull-finish back made by carrying the warp (or filling) uninterruptedly on the surface over many filling (or warp) yarns." *McGraw-Hill Dictionary of Scientific and Technical Terms* at 1663 (emphasis added). A twill weave is a "woven pattern of diagonal or twill lines that run upward to the right or left of the fabric face." *Id.* at 1983. While the definition of a twill weave does not refer to the closeness of the weave, the definition of satin specifically describes it as a "closely woven fabric." As such, the Court rejects GKD's argument that the subject cloth cannot be like a straining cloth because it allegedly does not have a close weave.

Based on all the dictionaries and encyclopedias consulted by the Court and the guidance provided by the Explanatory Notes, the Court finds that the subject merchandise is properly classifiable pursuant to subheading 5911.40.00, HTSUS. As the Court has determined that the subject merchandise fits within the definitions of the terms provided in subheading 5911.40.00, HTSUS, it is not necessary for the Court to discuss whether the fabric at issue consists of "multiple warp and weft."

CONCLUSION

For the foregoing reasons, this Court finds that Customs properly classified the subject merchandise under subheading 5911.40.00, HTSUS. Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment is granted. Judgment is hereby entered for defendant and this case is dismissed.

(Slip Op. 96–99)

NACCO MATERIALS HANDLING GROUP, INC., INDEPENDENT LIFT TRUCK BUILDERS UNION, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA (AFL-CIO), AND UNITED SHOP AND SERVICE EMPLOYEES, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TOYOTA MOTOR SALES, U.S.A., INC., DEFENDANT-INTERVENOR

Court No. 94–02–00096

Plaintiffs contest that aspect of Commerce's remand determination dealing with credit revenue offset. *See Final Results of Redetermination Pursuant to Court Remand* (Oct. 31, 1995) (revisiting aspects of Commerce's June 1, 1989, through May 31, 1990, administrative review of an antidumping duty order on certain internal-combustion, industrial forklift trucks from Japan, *Certain Internal-Combustion Industrial Forklift Trucks From Japan*, 59 Fed. Reg. 1374 (Dep't Comm. 1994) (final results)). Plaintiffs have also moved for oral argument. Defendant-Intervenor contests that aspect of Commerce's remand determination dealing with operator restraint safety seat retrofit expense.

Held: The Court remands on both issues, and denies plaintiffs' motion for oral argument.

(Date June 18, 1996)

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Mary T. Staley, and *David C. Smith, Jr.),* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, United States Department of Justice *(Michael S. Kane), Priya Alagiri,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

Dorsey & Whitney (John B. Rehm, Munford Page Hall, II, and *L. Daniel Mullaney),* for defendant-intervenor Toyota Motor Sales, U.S.A., Inc.

OPINION

CARMAN, *Judge:* Plaintiffs NACCO Materials Handling Group, Inc., Independent Lift Truck Builders Union, International Association of Machinists and Aerospace Workers, International Union, Allied Industrial Workers of America (AFL-CIO), and United Shop and Service Employees (collectively "plaintiffs") challenge that aspect of the Department of Commerce's ("Department" or "Commerce") *Final Results of Redetermination Pursuant to Court Remand* (Oct. 31, 1995) *(Redetermination)* dealing with credit revenue offset. Additionally, plaintiffs have requested oral argument on the *Redetermination.* Defendant-Intervenor Toyota Motor Sales, U.S.A., Inc. ("TMS" or "defendant-intervenor") challenges that aspect of Commerce's *Redetermination* dealing with operator restraint safety seat retrofit expense. The Court has retained jurisdiction during the pendency of this action. 28 U.S.C. § 1581(c) (1988).

BACKGROUND

A. *Procedural Background:*

On January 10, 1994, Commerce published the final results of its June 1, 1989, through May 31, 1990, administrative review of the antidumping duty order on certain internal-combustion, industrial forklift trucks from Japan. *See Certain Internal-Combustion Industrial Forklift*

Trucks From Japan, 59 Fed. Reg. 1374 (Dep't Comm. 1994) (final results) *(Final Results).* The review covered, in part, sales made by Toyota Motor Corporation (Toyota). *Id.* at 1375.[1]

Toyota's U.S. selling division, TMS sold Toyota's forklift trucks to dealers, who sold the forklift trucks to end-users. *Id.* at 1379. TMS' related finance company, Toyota Motor Credit Corporation (TMCC), provided financing for the purchases of both dealers and end-users. *Id.* Because Commerce based United States price (USP)[2] on the price to the first unrelated purchaser in the United States, Commerce based USP on what TMS charged unrelated dealers. *Id.*[3] In claiming credit revenue for its U.S. sales, however, Toyota claimed credit revenue TMCC received from both unrelated dealers and unrelated end-users resulting from the financing TMCC supplied. *Id.*[4] In the *Final Results,* Commerce allowed the inclusion of credit revenue received from unrelated dealers, but disallowed credit revenue received from unrelated end-users. *Id.* Commerce explained that because it had based USP on the price TMS charged unrelated dealers, Commerce considered "revenue generated as a result of the sale by the dealer to the end-user through a financing arrangement a separate transaction, and as such, not directly associated with the sales under review." *Id.*

During the administrative review, plaintiffs also urged Commerce to consider costs allegedly incurred by Toyota in retrofitting its forklifts with redesigned seats under an operator restraint safety seat (ORS) program as direct U.S. selling expenses. *Id.* at 1378. Toyota argued that any costs incurred due to the retrofit were only for forklifts imported and sold prior to the period of review (POR). *Id.* In the *Final Results,* Commerce concluded "there [was] no evidence on the record indicating that forklifts sold during the POR required retrofitting." *Id.* Furthermore, Commerce explained, "[p]etitioners have * * * provided no evidence that Toyota incurred any such expenses with respect to the Toyota sales made in the current POR." *Id.* Accordingly, Commerce made no adjustment in the *Final Results* for Toyota's alleged retrofitting expenses. *Id.*

In *NACCO Materials Handling Group, Inc. v. United States,* 896 F. Supp. 1248 (CIT 1995), this Court remanded the *Final Results* and ordered Commerce first

> to consider plaintiffs' argument that Toyota's credit revenue offset for interest income earned on financing arrangements made with unrelated dealers was improper because the financing and sale of

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[1] The Court notes that in its papers, defendant-intervenor abbreviates "Toyota Motor Sales, U.S.A., Inc." as "TMS" and "Toyota," whereas plaintiffs abbreviate "Toyota Motor Sales, Inc." as "TMS." Plaintiffs also complain that in part of the *Redetermination,* Commerce "repeatedly refers to 'Toyota.' Yet, nowhere does the Department describe which 'Toyota' entity it refers." (Pls.' Resp. to the Commerce Dep't's Final Results of Redetermination (Pls.' Resp.) at 4 (discussing the *Redetermination* at 4).) When not quoting a party, the Court's designations will mirror those used in the *Federal Register.*

[2] The Court notes that the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994), amended the antidumping statutes in many respects. Because Commerce's review in this case took place before the amendments took effect, however, this case is governed by the prior statutory scheme.

[3] In the *Final Results,* Commerce explains Toyota's USP "was based on the price TMS/TIE charged its unrelated dealers." *Final Results,* 59 Fed. Reg. at 1379. TIE is the Toyota Industrial Equipment Division of TMS. *Id.* at 1378.

[4] Toyota refers to these financing arrangements as "wholesale" and "retail" financing, respectively.

> the forklift trucks were separate transactions. If on remand Commerce determines that the corporate relationship of TMS, TMCC, and Toyota is a determinative factor in its consideration of plaintiffs' argument against Toyota's credit revenue offset, Commerce is instructed to explain its finding as to that relationship and to point out what evidence on the record, if any, supports its finding. Commerce is further instructed to provide an explanation of how it adjusts for credit revenue, and to state the statutory, regulatory, or other authority for making such adjustments. Second, Commerce is to make determinations with respect to the issue of whether the expenses of retrofitting forklift trucks with occupant restraint safety seats should have been deducted from U.S. price * * *.[5]

NACCO, 896 F. Supp. at 1257.

B. *Commerce's Redetermination:*

1. Toyota's Credit Revenue Offset for TMCC's Wholesale Financing Credit Revenue:

In the *Redetermination*, Commerce indicates TMS is a wholly-owned subsidiary of Toyota and TMCC is a wholly-owned subsidiary of TMS. *Redetermination* at 3. Commerce found this corporate relationship a determinative factor in its consideration of plaintiffs' argument against Toyota's credit revenue offset. *Id.* Commerce explains its practice is to "'combine the * * * activities of a parent and subsidiary when the parent exercises control over the subsidiary (i.e., meets the requirements for consolidation)' and to treat the entities as a consolidated group." *Id.* (quoting *Certain Carbon Steel Butt-Weld Pipe Fittings From Thailand*, 57 Fed. Reg. 21,065, 21,069 (Dep't Comm. 1992) (final determ.) *(Carbon Steel Butt-Weld Pipe Fittings)* and citing *New Minivans From Japan*, 57 Fed. Reg. 21,937, 21,946 (Dep't Comm. 1992) (final determ.) *(New Minivans)*). In this case, Commerce found control by TMS over TMCC to be clearly evident by the record. *Id.*[6] Thus,

> [t]reating the financing and sale of the forklift truck as one transaction in this case is based upon the Department's practice of combining the activities of the consolidated group. The Department, therefore, treated Toyota and its related entities as a consolidated group, and treated the operations of the financing entity, TMCC, as a member of the consolidated group. Thus, when TMS makes a sale

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[5] More specifically, on the ORS retrofit issue, this Court ordered Commerce to

> make the following determinations with respect to the issue of whether the expenses of retrofitting forklift trucks with occupant restraint safety seats * * * should have been deducted from United States price: (1) whether the Department should have investigated whether ORS retrofit expenses were incurred during the period of review, in light of the facts and arguments presented to the Department in Petitioners' Case Brief, Confidential Record 36, at 2–3; and if so, (2) whether Toyota incurred any ORS retrofit expenses during the period of review; and if so, (3) whether these expenses were deducted from United States price; and if not, (4) whether these ORS retrofit expenses were warranty expenses; * * *
>
> * * * if the Department determines that ORS retrofit expenses were incurred during the administrative review period, that they were not deducted from United States price, and that they were warranty expenses, the Department should recalculate Toyota's less-than-fair-value margins, deducting all warranty expenses from United States price * * *.

NACCO, 896 F. Supp. at 1258.

[6] Commerce explains:

> In Section A–2 of Toyota's questionnaire response to the Department (December 12, 1990), Toyota explains the relationship between Toyota's related entities. TMC wholly owns (100% ownership) TMS, and TMS wholly owns TMCC. Thus, there is clear evidence of control by parent over subsidiary, a fact undisputed by petitioners.

Redetermination at 3 n.3.

> to the unrelated dealer, and when TMCC finances that same sale to the unrelated dealer, the credit expense incurred and the interest revenue earned affects Toyota as a corporate entity and is based on the sale and financing arrangement made between Toyota as a corporate entity and the unrelated dealer.

Id. at 3–4 (citations omitted).[7]

Commerce addressed "plaintiffs' argument that Toyota's credit revenue offset for interest income earned on financing arrangements made with unrelated dealers was improper because, according to the plaintiffs, the financing and sale of the forklift trucks were separate transactions" as follows. *Id.* at 5 (citation omitted). Based on Commerce's practice of consolidation in antidumping cases, Commerce regarded "the sale by TMS and the financing by TMCC of that sale as one transaction from an antidumping analysis perspective." *Id.* Because Commerce uses the price to the first unrelated purchaser in the United States as the basis of USP, Commerce:

> used the price TMS charged its unrelated dealers as Toyota's USP and made the proper adjustments to USP with respect to Toyota's credit expense offset for interest income earned on the financing arrangements made between Toyota and the unrelated dealer. The sale and the financing of the sale are made by one entity, the Toyota consolidated group, and must be treated accordingly in an antidumping analysis.

Id.

2. The ORS Retrofit Issue:

Commerce determined that ORS seat retrofit expenses were incurred during the POR and that they are classifiable as warranty expenses. According to Commerce, warranty expenses are usually based on the repair or replacement cost for a defective item. Here, Commerce explains, Toyota incurred the expenses at issue as a result of replacing defective seats on the subject merchandise. Additionally,

> because warranty expenses are usually incurred at some time after a sale, the Department usually bases its calculation of per-unit warranty costs of current period expenses on historical information. Historical data are used as a measure by which to project future warranty expense incurred by a respondent on the sales reviewed * * *. Toyota reported that it incurred ORS retrofit expenses during

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[7] Commerce explains the mechanics of the adjustment for TMCC's wholesale credit revenue as follows:

> In an exporter's sales price * * * situation, as we have here, we make an adjustment to USP * * * for credit expense when the expense is incurred by or for the account of the exporter in the United States, as provided for under 772(e)(2) of the Tariff Act of 1930 * * *. The Department bases the adjustment on net credit expense to the respondent, and uses the information submitted by respondent in the calculation of net credit expense. In this case, Toyota incurs a credit expense on the sale of a forklift truck by providing financing which permits a customer (a dealer) a period of time to pay for the truck. Likewise, Toyota generates credit revenue, or interest income, by charging the dealer interest for the funds borrowed when Toyota extends financing to the unrelated dealer for the sale of the particular forklift truck. Thus, when interest income is earned on the same sale for which credit expense is incurred, the Department makes an adjustment for the net credit expense on the sale at issue. The sale at issue is the sale made by Toyota, the whole entity, to the first unrelated purchaser. The Department has, therefore, made the appropriate adjustment to Toyota's credit expense by offsetting the credit expense with the interest income earned on the financing arrangements made between Toyota and the unrelated dealer on the same sale of the forklift truck.

Redetermination at 4–5.

> the POR and that it reported certain of these expenses under the "Other U.S. Expenses" category. Toyota also reported additional ORS retrofit expenses that were incurred in Japan during the POR. Therefore, we have determined to use current period expenses as the basis for the adjustment. In accordance with our practice, we have treated the variable portion of the expense as direct, and the fixed expense portion as indirect.

Id. at 6 (citations omitted). Commerce recalculated Toyota's margin, accounting for the full amount of the ORS expenses during the POR on the subject merchandise and reflecting its classification of those expenses.

STANDARD OF REVIEW

The standard of review for this Court's review of a remand determination by Commerce is whether that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (current version at 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)).

DISCUSSION

A. *Toyota's Credit Revenue Offset for Wholesale Financing by TMCC:*

Plaintiffs contest this aspect of Commerce's *Redetermination.* The foundation for many of plaintiffs' arguments is plaintiffs' allegation that "[t]he loan of money is a separate transaction that is unrelated to the price negotiated for the sale of a forklift truck." (Pls.' Resp. at 1.) First, plaintiffs argue that circumstance-of-sale adjustments must relate to the *sale* of a product. *(Id.* at 2 (citing 19 U.S.C. § 1677b(a)(4)(B); *Smith-Corona Group v. United States,* 1 Fed. Cir. (T) 130, 143, 713 F.2d 1568, 1580 (1983), *cert. denied,* 465 U.S. 1022 (1984); 19 C.F.R. § 353.56).) Second, plaintiffs contend "any claimed adjustment for credit expense must be related not only to the sale of the product subject to review but also to the lost opportunity cost experienced by a seller to sell the product under review." *(Id.* at 3.) Third, "the transaction for which credit expenses are incurred," plaintiffs maintain, "must relate to the sales negotiation process between TMS and the dealer." *(Id.* at 6.) Here however, plaintiffs argue, nothing in the record suggests any nexus between the dealer's transaction with TMS and the dealer's transaction with TMCC.

Plaintiffs also attack Commerce's finding that the relationship between TMCC and TMS was a determinative factor in Commerce's decision, and claim Commerce failed to provide a reasonable explanation for this conclusion. Plaintiffs argue Commerce does not have a general policy of consolidating related entities. Furthermore, they claim, the decisions cited by the Department in support of its alleged general policy of consolidating related entities

> were limited to the calculation of interest expenses in cost of production or constructed value investigations and do not concern the calculation of imputed credit expenses for sales of the product

> under investigation * * *. [F]or purposes of calculating a respondent's *actual* interest expenses in *constructed value or cost of production investigation,* the Department consolidates the interest expenses incurred by a parent and its subsidiary. There is a very specific reason for doing so * * *. [T]he Department is attempting to ascertain the interest expense related to financing the working capital for the *production* of the subject merchandise. The Department consolidates the companies to calculate a respondent's *actual* interest expense in these instances because of the fungible nature of working capital used to finance the manufacture of products. The Department's position is that consolidation is required because a parent company has the authority to allocate funds for manufacturing purposes as it deems necessary.

(Id. at 6–7 (discussing *Carbon Steel Butt-Weld Pipe Fittings* and *New Minivans)* (citation omitted).) In contrast, plaintiffs argue, Commerce does not have a practice of consolidating related entities to calculate a respondent's selling expense. Instead, Commerce looks to each individual corporate entity to determine the selling expenses incurred that are related to the sale of the subject merchandise.[8]

Defendant-Intervenor supports Commerce's determination on this issue, and stresses two points. First, defendant-intervenor argues Commerce "has always recognized that the 'credit' extended to a customer—the payment terms under which the product is sold—dictates to a large extent both the price paid by the customer and the cost incurred by the seller." (Def.-Intervenor, TMS' Resp. to Def.'s Final Results of Redetermination Pursuant to Ct. Remand (TMS' Resp.) at 2.) Commerce routinely takes both into account, defendant-intervenor maintains, in antidumping analyses.[9] "Given the fact that credit or financing arrangements for the sale of subject merchandise are *always* a part of the Department's antidumping analysis," defendant-intervenor continues, "the *only* question presented is whether this case is unusual enough to require an exception to the well-established rule. There is *not a single shred of evidence* that an exception should be made." *(Id.* at 3.)

Second, defendant-intervenor defends Commerce's decision to use prices paid by related dealers in Japan as a basis for foreign market value while refusing to use prices "'paid' to TMS by TMCC, a related entity, in the United States. In other words, the Department merged TMCC with TMS for purposes of its antidumping duty analysis, but decided not to merge related dealers in Japan with [Toyota]." *(Id.)* Defendant-Intervenor argues that unlike Commerce's calculation of USP, specific regulatory authority permits Commerce to base foreign market value on sales to related dealers in the home market, if Commerce is satisfied those sales were at arm's length. *(Id.* at 3–4 (citing 19

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[8] Even if consolidation did apply, plaintiffs argue, Commerce would be required to exclude interest income on TMCC's long-term loans under that policy. (Pls.' Resp. at 9 (discussing *New Minivans,* 57 Fed. Reg. at 21,948).) Plaintiffs further argue that if consolidation did apply, Commerce should have applied that principle to all transactions, namely, to those involving Toyota's financial institution in Japan, Toyota Finance Corporation.

[9] Defendant-Intervenor also points to 19 U.S.C. § 1677b(a)(4) and 19 C.F.R. § 353.56(a)(2) ("Differences in circumstances of sale for which the Secretary will make reasonable allowances normally are those involving differences in * * * credit terms * * *.").

U.S.C. § 1677(13); 19 U.S.C. § 1677a(c); 19 C.F.R. § 353.41(c); 19 C.F.R. § 353.45(a)).) "[T]he only permissible U.S. price is that paid by the unrelated customer. That price is paid to TMCC, and it includes credit revenue. The TMCC-TMS 'price,' whether 'arm's-length' or not, may not be used as U.S. price under any circumstances." *(Id.* at 4.)

Commerce claims to have a practice of combining a parent's activities with those of its subsidiary when the "requirements for consolidation" are met. In support of this claim, Commerce cites to *Carbon Steel Butt-Weld Pipe Fittings* and *New Minivans.* In *Carbon Steel Butt-Weld Pipe Fittings,* the respondent argued Commerce should not consolidate the company under investigation with its parent company in calculating interest expense for cost of production (COP) and constructed value (CV) where the parent and the subsidiary do not consolidate their financial statements. *Carbon Steel Butt-Weld Pipe Fittings,* 57 Fed. Reg. at 21,069. "In those instances where the parent and subsidiary do not consolidate their financial statements," respondents argued, "the Department combines interest expense of the parent and its subsidiary only when there is a showing that the parent has provided substantial financing to the subsidiary." Commerce responded in part as follows:

> [W]e should consolidate the interest expense. The Department calculates the representative financing expenses of a subsidiary based upon the expenses incurred by the consolidated entity because of the fungible nature of capital * * *. Contrary to [respondent's] presumptions, it is the Department's policy to combine the financing activities of a parent and subsidiary when the parent exercises control over the subsidiary *(i.e.,* meets the requirements for consolidation).
>
> Although [the parent and the subsidiary] chose not to prepare consolidated financial statements, [the parent] nevertheless maintains control over [the subsidiary's] operations. Expenses incurred on behalf of a subsidiary are reflective of the financing costs incurred in production and are appropriately included in the COP or CV regardless of the country in which the expenses are reported. Therefore, the Department combined the financing expenses of the parent and subsidiary * * *.

Id.

In *New Minivans,* Commerce rejected a respondent's claim that Commerce should calculate net interest expense incurred in production of the subject merchandise using "non-consolidated interest income and expense as the best reflection of the borrowing costs incurred by that company to fund its automobile manufacturing operations." *New Minivans,* 57 Fed. Reg. at 21,945. In so doing, Commerce explained it followed its

> well-established practice of deriving net financing costs based on the borrowing experience of the consolidated group of companies. The Department has followed this practice in those cases involving consolidated groups whose member companies are involved in a wide variety of business activities. Our practice is based on the fact that the group's parent, primary operating company, or other con-

> trolling entity, because of its influential ownership interest, has the power to determine the capital structure of each member company within the group.
>
> * * * According to generally accepted accounting principles (GAAP), in most circumstances, majority equity ownership is *prima facie* evidence of corporate control.

Id. at 21,946 (citations omitted). Commerce also addressed respondent's argument that, if Commerce did use a consolidated interest expense calculation, the respondent's related financing company warranted special treatment because the financing company

> operates like a bank and, as such, its operating revenues are derived from interest income on auto loans. [Respondent] contends that if the Department includes all of [the financing company's] interest expense in its net interest expense calculation, equity dictates that this expense should be offset by all of [the financing company's] interest income including that earned from automobile installment loans which, in a non-financial entity, would be classified as interest income.

Id. In response, Commerce

> determined that, as a member of a consolidated group of companies, the operations of a financing company remain under the controlling influence of the group. Like other members of the consolidated group, the financing company's capital structure is largely determined within the group. Consequently, its interest income and expenses are as much a part of the group's overall borrowing experience as any other member company * * *. [W]e note that, while we have included in our calculation of [respondent's] net interest expense the interest income earned by [the financing company] on its short-term investments of working capital, we have excluded [its] installment loan revenue. We consider these loans to be long-term investments. The Department's traditional practice has been to exclude income earned from such investments since it does not reflect working capital investments available for the group's daily business activities.

Id. (citations omitted).

As discussed above, plaintiffs argue the consolidations used in *New Minivans* and *Carbon Steel Butt-Weld Pipe Fittings* were limited to calculation of interest expense in cost of production or constructed value investigations. The Court cannot discern Commerce's reasoning for applying these principles to the present case, however, because in the *Redetermination* Commerce merely states that consolidation is the Department's practice "'when the parent exercises control over the subsidiary,'" and then cites to *New Minivans* and *Carbon Steel Butt-Weld Pipe Fittings*. In addition to the lack of clarity regarding whether this "practice" of consolidation applies generally in antidumping determinations and in this case specifically, Commerce never explains just what the "requirements for consolidation" consist of. This Court finds Commerce's explanation in the *Redetermination* is so sparse, Commerce has

failed to provide this Court with a sufficient explanation to enable it to rule on the agency's determination. *See, e.g., Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 855 F. Supp. 1306, 1312 (1994) (finding a lack of clarity in the agency's decision prevented the Court from discerning the path taken by the agency and "improperly require[d] the Court to 'supply a reasoned basis for the [agency's] action that the [agency] itself'" did not give) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974)), *aff'd sub nom. Citgo Petroleum Corp. v. U.S. Foreign-Trade Zones Bd.*, No. 95–1390 (Fed. Cir. May 3, 1996).[10] Accordingly, this Court remands this issue to Commerce for further explication. On remand, Commerce is to: (1) explain whether Commerce has a general practice of consolidating parent companies and subsidiaries in antidumping determinations, and if so, (a) state what statutory and regulatory authority and case law supports this practice, and (b) provide a list of citations of determinations in which Commerce has applied its practice; (2) explain whether Commerce has been using consolidation only in the calculation of COP or CV, and if so, explain Commerce's reasoning and authority—statutory, regulatory, and case law—for extending this practice to the present case; (3) explain what the "requirements for control" are and how they are met, if they are met, in the present case; (4) explain whether, in accordance with *New Minivans* and/or any Department practice, statute, or regulation, Commerce is required to differentiate long-term loans from other loans for the purpose of excluding interest income on TMCC's long-term loans.

The Court further notes it would have difficulty upholding as based on substantial evidence Commerce's finding that TMS' control over TMCC is "clearly evident by the record." *See Redetermination* at 3 (footnote omitted). It would appear the sole support Commerce provides for this finding is the 100% ownership of TMCC by TMS, and of TMS by Toyota. Presumably, Commerce is basing its finding on its statement in *New Minivans* that under GAAP, "in most circumstances, majority equity ownership is *prima facie* evidence of corporate control." *New Minivans*, 57 Fed. Reg. at 21,946 (citation omitted). The Court orders Commerce on remand to point out additional evidence on the record supporting Commerce's finding of control sufficient to justify consolidation, and to reopen the record if necessary. Additionally, Commerce should readdress plaintiffs' argument that the sale and financing of the forklift trucks were separate transactions if necessary in light of any of Commerce's findings on remand.

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[10] The Court also notes the following comments from counsel for Commerce during oral argument before this Court prior to remand:

> The reason why the Department of Commerce has consented to a remand with respect to so many issues in this case and the companion case is you've carefully gone through the record, you can't figure out what's going on, because institutionally the people who are dealing with this case have left and it's very difficult to figure out what information is there, what the information that's there represents * * *. In many ways with respect to some of these issues it's almost as if we're starting from scratch because the record is so indecipherable.

(Tr. at 104–05.) Notwithstanding any deficiencies in the record and the purported difficulties in deciphering the record, the agency must advance a reasoned basis for its actions.

B. *The ORS Retrofit Issue:*

Defendant-Intervenor urges this Court to hold that Commerce's *Final Results* stand insofar as the ORS retrofit issue is concerned. Defendant-Intervenor admits Toyota incurred ORS retrofit expenses during the period of review, and that "[t]hese expenses were partially deducted from United States price, as the Department correctly determined." (TMS' Resp. at 7.) Defendant-Intervenor argues, however, that the ORS expenses are not warranty expenses. First, according to defendant-intervenor, the ORS expenses were not pursuant to a warranty obligation and therefore cannot be treated as warranty expenses. Additionally, "the ORS retrofit was a one-time, extraordinary event that was directly related to sales made well before the administrative review period." *(Id.* at 8.)[11] Thus, defendant-intervenor argues, Commerce should not deduct the ORS retrofit expenses from USP either as warranty or indirect expenses.[12]

Second, defendant-intervenor attacks what it characterizes as Commerce's determination "that, even if an expense is not a warranty—and the Department does not and cannot assert that these expenses were paid pursuant to any warranty—the Department will treat the expenses as if they were a warranty." *(Id.* at 9 (discussing *Redetermination* at 13 ("The duration of a warranty contract does not dictate the Department's treatment of a warranty or warranty-like expense. If, in all respects, the expense is consistent with the nature of a warranty expense, it is irrelevant whether the respondent views the expense as incurred pursuant to an express or implied warranty.").) Defendant-Intervenor finds two faults with Commerce's analysis. First, defendant-intervenor finds Commerce's actions contrary to the remand order, "which directs the Department to make an adjustment only if it finds that the ORS expenses *were* warranty expenses." *(Id.)* Second, defendant-intervenor argues Commerce's analysis runs contrary to the principle of warranty adjustments:

> Price adjustments are made for warranty because both seller and buyer know at the time of sale that there is a warranty obligation and that certain costs will be incurred to meet this obligation. If there is no warranty obligation at the time of sale, then there are no warranty expenses directly related to the sale.

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[11] Defendant-Intervenor adds "that Toyota incurred expense over a period of time for this one-time extraordinary event does not make the nature of this expense recurring or on-going." (TMS' Resp. at 8 n.4.)

[12] In support of its argument that the ORS retrofit expenses are not warranty expenses, defendant-intervenor also quotes as follows from one of its submissions to Commerce during the remand proceeding:

> "ORS expenses were entirely unrelated to warranty, and, unlike warranty, were not an obligation assumed by Toyota at the time of sale. Indeed, all of the forklift trucks retrofitted during the AR2 period, having been sold many years before, were well outside of the 1-year warranty period applicable to such trucks. Eligibility for the ORS retrofit was not tied to warranty periods—an eligible forklift truck qualified for the ORS retrofit, regardless of whether the forklift truck was still covered by warranty. ORS expenses were an extraordinary, one-time expenses incurred solely on behalf of discontinued series of forklift trucks."

(TMS' Resp. at 8 (quoting Remand Pub. R. 1 at 2–3).)

(Id. (citing *Drycleaning Machinery From West Germany,* 50 Fed. Reg. 32,154, 32,155 (Dep't Comm. 1985) (final results)).).[13]

The Court cannot discern from the *Redetermination* whether Commerce has adjusted for ORS retrofit expenses as a warranty expense attributable to the sales under consideration, or whether Commerce is attempting to capture expenses expended during the POR but attributable to sales from a prior POR. For example, in the *Redetermination* Commerce states, "There is no dispute that Toyota incurred expenses for ORS retrofitting during the POR for the replacement of seats on forklift trucks subject to the order." *Redetermination* at 13. This does not necessarily mean, however, that Commerce is attributing the ORS retrofit expenses to the sales made during the POR under review. The Court notes Commerce also states, "[G]iven the fact that certain forklift trucks still require retrofitting with the ORS seats, and Toyota's history of incurring this expense, it is likely that Toyota will incur ORS seat retrofit expenses in the future." *Id.* Commerce has not explained, however, whether it has determined that ORS retrofit expenses will be incurred in the future on forklift trucks sold during the POR under review. It is unclear whether the "certain forklift trucks [that] still require retrofitting" were sold during the POR under review, or whether those trucks were sold during a prior POR but have for some reason not yet been retrofitted.[14]

Accordingly, the Court remands on the ORS retrofit issue as well. *See, e.g., Conoco, Inc.,* 855 F. Supp. at 1312 (explaining that the agency "and not the Court bears the burden of 'articulat[ing] a satisfactory explanation for its action including a rational connection between the facts found that the choice made.'") (citation omitted). On remand, Commerce is to: (1) explain whether and why the ORS retrofit expenses are warranty expenses, and if so, explain under what statutory and regulatory authority, and case law, Commerce has classified them as warranty expenses; (2) explain whether the ORS retrofit expenses at issue are related to sales made during the POR at issue, and if not, what statutory and regulatory authority authorizes Commerce's actions; (3) explain whether the forklift trucks sold during the POR at issue were manufactured with the same defective seat which requires retrofitting, such that the forklift trucks sold during the POR at issue will or should require retrofitting in the future; and (4) if the ORS retrofit expenses were incurred due to forklift trucks sold during a prior POR, explain whether Commerce is treating the ORS retrofit expenses at issue as a basis for

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[13] Defendant-Intervenor had also argued in its *Redetermination* comments to this Court that plaintiffs did not raise the ORS expense issue below in a timely fashion. *(See* TMS' Resp. at 5–7.) In a subsequent letter, however, defendant-intervenor informed this Court:

> It has been brought to Toyota's attention by the Department of Commerce that plaintiffs did raise this issue [of the ORS retrofit] in its letter to the Department of Commerce of April 12, 1991, prior to the publication of the preliminary determination. Therefore, Toyota withdraws its comment that the ORS issue was not timely raised. The withdrawal of this comment, does not, however, change the fact the [sic] the ORS expenses are not warranty expenses and should not be treated as such.

(NACCO Materials Handling Group, Inc. v. United States, No. 94–02–00096 (CIT Nov. 29, 1995) (letter from Dorsey & Whitney).)

[14] According to defendant-intervenor, the forklift trucks that require retrofitting are a discontinued series. *(See* TMS' Resp. at 8.)

estimating warranty expenses for forklift trucks sold during the POR under review.

C. *Motion for Oral Argument:*

Plaintiffs have submitted a motion requesting oral argument on the *Redetermination,* which defendant-intervenor opposes. Given the Court's remand on both issues, the Court denies plaintiffs' present motion requesting oral argument on the *Redetermination.*

CONCLUSION

After considering Commerce's *Redetermination* as well as the parties' arguments, this Court remands Commerce's *Final Results of Redetermination Pursuant to Court Remand* (Oct. 31, 1995) (revisiting aspects of *Certain Internal-Combustion Industrial Forklift Trucks From Japan,* 59 Fed. Reg. 1374 (Dep't Comm. 1994) (final results)) on the issues of credit revenue offset and ORS retrofit expense. On the issue of credit revenue offset, on remand, Commerce is to: (1) explain whether Commerce has a general practice of consolidating parent companies and subsidiaries in antidumping determinations, and if so, (a) state what statutory and regulatory authority and case law supports this practice, and (b) provide a list of citations of determinations in which Commerce has applied its practice; (2) explain whether Commerce has been using consolidation only in the calculation of COP or CV, and if so, explain Commerce's reasoning and authority—statutory, regulatory, and case law—for extending this practice to the present case; (3) explain what the "requirements for control" are and how they are met, if they are met, in the present case; (4) explain whether, in accordance with *New Minivans* and/or any Department practice, statute, or regulation, Commerce is required to differentiate long-term loans from other loans for the purpose of excluding interest income on TMCC's long-term loans; (5) point out what evidence on the record supports a finding of control, and any evidence supporting consolidation, in the present case, and reopen the record if necessary; and (6) if necessary in light of any of Commerce's findings on remand, readdress plaintiffs' argument that the sale and financing of the forklift trucks were separate transactions. On the issue of ORS retrofit expenses, on remand, Commerce is to: (1) explain whether and why the ORS retrofit expenses are warranty expenses, and if so, explain under what statutory and regulatory authority, and case law, Commerce has classified them as warranty expenses; (2) explain whether the ORS retrofit expenses at issue are related to sales made during the POR at issue, and if not, what statutory and regulatory authority authorizes Commerce's actions; (3) explain whether the forklift trucks sold during the POR at issue were manufactured with the same defective seat which requires retrofitting, such that the forklift trucks sold during the POR at issue will or should require retrofitting in the future; and (4) if the ORS retrofit expenses were incurred due to forklift trucks sold during a prior POR, explain whether Commerce is treating the ORS retrofit expenses at issue as a basis for estimating warranty expenses for trucks sold during the POR under review. Commerce

should also perform any recalculations necessary to effect its remand determination. The Court denies plaintiffs' motion for oral argument on the *Redetermination.*

(Slip Op. 96–100)

WHEATLAND TUBE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND DONGBU STEEL CO., LTD, HYUNDAI PIPE CO., LTD., SEAH STEEL CORP., SHINHO STEEL CO., LTD., UNION STEEL MANUFACTURING CO., LTD., TUBERIA NACIONAL, S.A. DE C.V., HYLSA, S.A. DE C.V., AND WESTERN AMERICAN MANUFACTURING, INC., DEFENDANT-INTERVENORS

Court No. 96–04–01078

[Preliminary injunction denied.]

(Dated June 19, 1996)

Schagrin Associates (Roger B. Schagrin) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Lucius B. Lau,* Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Morrison & Foerster (Donald B. Cameron, Craig A. Lewis and *Panagiotis C. Bayz)* for defendant-intervenor Dongbu Steel Co., Ltd, Hyundai Pipe Co., Ltd., SeAH Steel Corp., Shinho Steel Co., Ltd., and Union Steel Manufacturing Co., Ltd.

White & Case (Walter J. Spak and *David E. Bond)* for defendant-intervenor Tuberia Nacional, S.A. de C.V.

Shearman & Sterling (Jeffrey M. Winton and *Michael J. Chapman)* for defendant-intervenor Hylsa, S.A. de C.V.

Meeks & Sheppard (Ralph H. Sheppard) for defendant-intervenor Western American Manufacturing, Inc.

OPINION

RESTANI, *Judge:* Plaintiff, a domestic pipe producer, filed a petition alleging circumvention of antidumping orders on standard pipe by imports from Brazil, Korea and Mexico. The relief requested in the petition was treated as a request as to the scope of the orders and was denied by the United States Department of Commerce ("Commerce"). *See Final Negative Determination of Scope Inquiry on Certain Circular Welded Non-Alloy Steel Pipe and Tube from Brazil, the Republic of Korea, Mexico and Venezuela,* 56 Fed. Reg. 11,608 (Dep't Comm. 1996). Plaintiff seeks to preliminarily enjoin liquidation of formerly suspended entries pending final resolution of its challenge to the negative scope determination.

Except in the case of periodic administrative reviews, where issues of mootness create a presumption of irreparable harm, domestic parties have long been required to demonstrate with particularity the probabil-

ity of irreparable harm arising from fully negative unfair trade determinations. *Compare Zenith Radio Corp. v. United States,* 710 F.2d 806 (Fed. Cir. 1983) (injunction granted in periodic review challenge) *with American Spring Wire Corp. v. United States,* 7 CIT 2, 578 F.Supp. 1405 (1984) (injunction denied in challenge to International Trade Commission ("ITC") negative injury determination) *and Smith Corona Corp. v. United States,* 11 CIT 954, 965–68, 678 F.Supp. 293–96 (1987) (injunction denied in challenge to Commerce negative scope determination); *see also Brother Indus. (USA), Inc. v. United States,* 17 CIT 748, 750 (1993). Here plaintiff makes no attempt to demonstrate harm with particularity. The fact that past entries of a foreign competitor's goods may avoid duties is not a showing of injury to the domestic competitor. Furthermore, an ITC finding of injury to the multi-producer domestic standard pipe industry does not demonstrate injury to this single producer from other pipe products.

Accordingly, plaintiff's motion for preliminary injunction is denied.

(Slip Op. 96–101)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Consolidated Court No. 93–12–00795

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record as to the Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan ("Final Results"),* 58 Fed. Reg. 64,720 (Dec. 9, 1993), covering four administrative reviews conducted simultaneously. At issue are the 1990–91 and 1991–92 review periods. Plaintiffs contend that the Final Results are flawed because Commerce improperly (1) rejected plaintiffs' proposed ten percent cap on the permissible deviations in its model matches; (2) denied plaintiffs a price-based level-of-trade adjustment to sales; (3) calculated adjustments for United States discounts and sales allowances using best information available instead of the customer-specific data submitted by plaintiffs; (4) refused to add direct selling expenses to foreign market value; (5) applied best information available to plaintiffs' cost of manufacturing, adjusting reported related-party transfer prices in calculating constructed value; (6) used individual cups and cones as comparison models notwithstanding that these tapered roller bearing components were sold only as sets; and (7) used sales of sample and obsolete products for comparison purposes.

Held: Plaintiffs' motion is granted in part. This case is remanded to Commerce to recalculate adjustments for United States discounts and selling expenses using the customer-specific data reported by plaintiffs which fully responds to Commerce's request for information. Plaintiffs' motion is denied in all other respects.

[Plaintiffs' motion for judgment on the agency record granted in part, denied in part; case remanded.]

(Dated June 19, 1996)

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Susan P. Strommer and *Elizabeth C. Hafner)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Michael S. Kane);* of counsel: *Linda Chang,* Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Lane S. Hurewitz and *Olufemi A. Areola)* for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* At issue in this action are certain aspects of the final determinations of the United States Department of Commerce, International Trade Administration ("Commerce"), entitled *Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan ("Final Results"),* 58 Fed. Reg. 64,720 (Dec. 9, 1993). The Final Results are the culmination of four administrative reviews which were conducted simultaneously and cover the 1990–91 and 1991–92 periods of review ("POR"). Plaintiffs, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"), challenge Commerce's final dumping margin determinations, alleging that Commerce improperly (1) rejected Koyo's proposed ten percent cap on the permissible deviations in its model matches; (2) denied Koyo a price-based level-of-trade adjustment to sales; (3) calculated adjustments for United States discounts and sales allowances using best information available ("BIA") instead of Koyo's reported customer-specific data; (4) refused to add direct selling expenses to foreign market value ("FMV"); (5) applied BIA to Koyo's cost of manufacturing ("COM"), adjusting reported related-party transfer prices in calculating constructed value ("CV"); (6) used individual cups and cones as comparison models notwithstanding that these tapered roller bearing ("TRB") components were sold only as sets; and (7) used sales of sample and obsolete products for comparison purposes. Koyo moves for judgment on the administrative record pursuant to Rule 56.2 of the Rules of the Court, alleging that the Final Results are unsupported by substantial evidence on the administrative record and not in accordance with law. Mem. Pls.' Supp. Mot. J. Agency R.

BACKGROUND

The preliminary determinations in the four administrative reviews at issue here were published in *Preliminary Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan,* 58 Fed. Reg. 51,058 (Sept. 30, 1993).

The Final Results for the four reviews are published in 58 Fed. Reg. at 64,720.[1]

DISCUSSION

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

1. *Model-Match Methodology:*

In order to compare the United States price ("USP") and FMV of the merchandise in question, Commerce must determine what merchandise is "such or similar" to that sold in the United States. *See* 19 U.S.C. § 1677(16) (1988). In conjunction with a twenty percent cost cap that prevents matching of United States and home market models whose variable cost of manufacturing differs by more than twenty percent, Commerce here utilized the five-criteria model-match methodology, also referred to as the "sum of the deviations" methodology. Commerce rejected the use of an additional ten percent cap upon the deviations of any one criteria when selecting the home market TRB model most similar to the United States model. *Final Results,* 58 Fed. Reg. at 64,721.

Koyo challenges Commerce's approach. According to Koyo, use of the ten percent limit on the permissible deviation of the individual criteria is imperative because "TRB models may be very similar in four of the five physical criteria and yet still be commercially very dissimilar products if they differ significantly (i.e., by more than ten percent) in the remaining criterion." Mem. Supp. Pls.' Mot. J. Agency R. at 18.

In the Final Results, Commerce expressed that Koyo's proposed ten percent cap in conjunction with its sum of the deviations model-match methodology would "eliminate matches of essentially comparable merchandise" because "the best overall match could be eliminated simply because a single physical criterion deviated by more than 10 percent" in one or more physical criteria.[2] *Final Results,* 58 Fed. Reg. at 64,721. Adhering to this position, Commerce submits that its rejection of the ten

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[1] Court No. 93–12–00796 challenges Commerce's Final Results with respect to entries made during the October 1, 1990 through September 30, 1991 review period of tapered roller bearings ("TRBs") of over 4 inches. Court No. 93–12–00795 challenges the same category of entries for the identical period of time in 1991/92. Court No. 93–12–00798 challenges the treatment afforded 0–4 inch TRBs during the August 1, 1990 through September 30, 1991 POR and Court No. 93–12–00797 makes the same challenge for the POR October 1, 1991 through September 30, 1992.

[2] The five physical criteria used as selection criteria in the "sum of the deviations" methodology are: inner diameter, outer diameter, width, Y factor and dynamic load rating. Def.'s Opp. to Pls.' Mot. for J. on the Agency R. at 11.

percent cap in these reviews was a reasonable exercise of its statutory mandate. Def.'s Opp. Pls.' Mot. J. Agency R. at 11–13.

In *Koyo Seiko Co. v. United States*, 66 F.3d 1204 (Fed. Cir. 1995), Commerce had used the sum of the deviations methodology for matching U.S. TRBs with home market TRBs, without the ten percent cap on the deviation of any one criteria. Commerce had also "eliminated from its analysis any potential comparisons for which the difference in the variable costs between the home-market model and the target U.S. model exceeded twenty percent." *Koyo Seiko*, 66 F.3d at 1210. The United States Court of Appeals for the Federal Circuit ("CAFC") upheld Commerce's use of the sum of the deviations model-match methodology without a ten percent cap, finding it a permissible and reasonable construction of the statute. *Id.* at 1208–11. *See* 19 U.S.C. § 1677b (1988); 19 U.S.C. § 1677(16). Therefore, the Court rejects Koyo's argument and defers to Commerce's choice of model-match methodology without the ten percent cap to yield "such or similar" merchandise. *See NSK Ltd. v. United States*, 19 CIT ___, ___, Slip Op. 95–204 at 6–7 (Dec. 18, 1995); *NSK Ltd. v. United States*, 19 CIT ___, ___, Slip Op. 96–53 at 6 (Mar. 13, 1996).

2. *Comparison of Sales Across Different Levels of Trade:*

In the United States and in Japan, Koyo's TRB sales to original equipment manufacturers ("OEM") customers and aftermarket ("AM") customers constitute sales at two different levels of trade. Commerce compared products sold at the different levels of trade but denied Koyo a level-of-trade adjustment. Although Commerce determined that Koyo demonstrated that net prices vary between levels of trade, it found that Koyo "did not provide evidence that this variation in price was the result of different costs incurred at different levels of trade." *Final Results*, 58 Fed. Reg. at 64,731.

Koyo submits that its dumping margins were artificially inflated because it was denied a level-of-trade adjustment to foreign market prices. Mem. Supp. Pls.' Mot. J. Agency R. at 9–10. In particular, Koyo asserts that Commerce's refusal to grant it a level-of-trade adjustment on any basis other than differences in selling costs ignores economic reality because "a product can have a higher *value* in the marketplace depending on the level of trade at which it is sold, completely apart from the difference in actual selling expenses." *Id.* at 21. Among other record evidence, Koyo relies heavily for support on a study by Dr. Robert E. Litan entitled *Level of Trade Adjustments: An Economic Analysis [1990–91 Administrative Review of Koyo Seiko Co., Ltd. Tapered Roller Bearings From Japan]* ("Litan Study") contained in Koyo's Supplemental Questionnaire Response, June 10, 1993 submission, Confidential R. Doc. No. 71, Exhibit 1 at 4.[3] *Id.* at 22–24. Koyo represents that its price differentials were calculated based on prices at each trade level net of all

[3] Koyo also cites Confidential R. Doc. No. 9 (Koyo's 1990/91 Section IV Questionnaire Response, dated March 27, 1992, at 8–14 and Exhibit A–9) and Confidential R. Doc. No. 40 (Koyo's 1991/92 Section IV Questionnaire Response, dated March 30, 1993, at 7–13 and Exhibit A–9).

charges and adjustments, including circumstances of sale adjustments. Thus, Koyo claims the price differentials are attributable solely to differences in levels of trade as opposed to other factors. *Id.* at 23–24. Koyo argues that 19 C.F.R. § 353.58 requires that Commerce make appropriate adjustments for differences affecting price, not cost, comparability. *Id.* at 24–25. Koyo seeks a price-based level-of-trade adjustment, or at a minimum, an explanation of why its calculation of the price differential is unacceptable. *Id.* at 27.

Commerce refutes Koyo's arguments, asserting that Koyo has simply adduced evidence of its price structure, but failed to satisfy its burden of demonstrating entitlement to a level-of-trade adjustment. Def.'s Opp. Pls.' Mot. J. Agency R. at 14–18. Conceding only that the Litan Study establishes the existence of price differences at the two trade levels at issue, Commerce points out that the study fails to establish that the price differentials are attributable solely to differences in levels of trade. *Id.* at 17–18.

Koyo bears the burden of demonstrating entitlement to the claimed adjustment. *See NTN Bearing Corp. of Am. v. United States,* 19 CIT ___, ___, 903 F. Supp. 62, 70 (1995). *See also Fundicao Tupy S.A. v. United States,* 12 CIT 6, 7–8, 678 F. Supp. 898, 900 (1988), *aff'd,* 859 F.2d 915 (Fed. Cir. 1988).

The Court agrees with Commerce that Dr. Litan's calculations demonstrate price differentials reflecting something other than level of trade. Def.'s Opp. Pls.' Mot. J. Agency R. at 18. Even if the Litan Study accurately calculated price differentials net of all charges and adjustments, it does not establish that Koyo's price differentials on sales to its OEM and AM customers are attributable solely to differences in level of trade. *See* Litan Study, Confidential R. Doc. No. 71. Under the circumstances, Commerce properly denied Koyo's claimed level-of-trade adjustment.

In addition, the Court has stated that

> when Commerce compares one discrete level of trade in one market with another discrete level of trade in the other market, adjustments will be made if claimant sufficiently proves that any difference in price in the two markets for an identical product is due to quantity-discounts given to larger volume buyers.

NAR S.p.A. v. United States, 13 CIT 82, 84, 707 F. Supp. 553, 557 (1989). *See also* 19 U.S.C. § 1677b(a)(4). In the case at bar, Koyo merely argues that the differing economic value of its product is related to the prices charged by its customers to their end customers buying in large or small quantities. Mem. Supp. Pls.' Mot. J. Agency R. at 23–26. *See also* Litan Study at 8–9. Koyo proffers no evidence demonstrating that discounting of quantity sales affected price.

Koyo also argues that market power and market pressures are part of the differing value of its product and should be considered. Mem. Supp. Pls.' Mot. J. Agency R. at 23–27. However, Koyo's "value" argument is unavailing. "The ready availability of cost data that can be employed

without extensive complex econometric analysis supports the reasonableness of [Commerce's] decision to rely on cost. Cost may be the only *practical* way to administer the statute." *Smith-Corona Group v. United States*, 713 F.2d 1568, 1577 n.27 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *see Daewoo Elecs. Co. v. International Union of Elec., Electrical, Technical, Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1518 (Fed. Cir. 1993), *cert. denied sub nom. International Union of Elec., Electrical, Technical, Salaried & Mach. Workers, AFL-CIO v. United States*, 114 S. Ct. 2672 (1994). Similarly, in this case, cost may be the only practical way of determining whether to grant a level-of-trade adjustment.

The Court has previously upheld Commerce's denial of a level-of-trade adjustment where plaintiff sought a trade level adjustment for price differentials and/or an explanation of why the claim was inadequate but failed to quantify its claimed price differentials attributed to differences in levels of trade. *See NTN Bearing Corp. of Am. v. United States*, 19 CIT ___, ___, 905 F. Supp. 1083, 1093–94 (1995); *NTN Bearing Corp. of Am. v. United States*, 17 CIT 1149, 1154, 835 F. Supp. 646, 650 (1993). *See also NTN Bearing Corp. of Am. v. United States*, 20 CIT ___, ___, Slip Op. 96–67 at 20 (Apr. 19, 1996).

For the reasons noted above, Commerce was justified in denying Koyo a level-of-trade adjustment and its decision is sustained.

3. *Koyo's United States Discounts and Sales Allowances:*

Koyo reported United States discounts and sales adjustments on a customer-specific basis. Because "Koyo's U.S. discounts and sales allowances were not reported on a transaction-specific basis, [Commerce] assigned, as BIA, the highest percentage discount or sales allowance reported for any U.S. sale to all sales that received a discount or sales allowance." *Final Results*, 58 Fed. Reg. at 64,725.

Koyo challenges Commerce's application of BIA in place of Koyo's reported data. Koyo argues that Commerce accepted customer-based data in previous reviews and gave no notice prior to the Final Results that it was reversing established practice. According to Koyo, the supplemental questionnaire from Commerce in these reviews indicated that Commerce would continue to accept Koyo's customer-specific rates. Koyo also argues that Commerce never requested data on U.S. discounts and allowances calculated on a different basis. Mem. Supp. Pls.' Mot. J. Agency R. at 27–33.

Commerce concedes that it did have an established practice of accepting discounts and sales allowances data reported on a customer-specific basis and that it did not request additional data of Koyo or issue a deficiency notice. Under these circumstances, Commerce requests "a remand for the purpose of recalculating the adjustments using Koyo's customer-specific data." Def.'s Opp. Pls.' Mot. J. Agency R. at 19.

Accordingly, this case is remanded to Commerce to recalculate adjustments for United States discounts and selling expenses using the cus-

tomer-specific data reported by Koyo which fully responds to Commerce's request for information.

4. *Deduction of Direct Selling Expenses From United States Price:*

Koyo further claimed that Commerce erred in adjusting for United States direct selling expenses by deducting them from United States price in exporter's sales price transactions rather than adding them to foreign market value. Koyo argued that the Court has repeatedly held that direct selling expenses should be added to foreign market value. Mem. Supp. Pls.' Mot. J. Agency R. at 33–35. However, Koyo now withdraws its claim in light of *Koyo Seiko Co. v. United States,* 36 F.3d 1565 (Fed. Cir. 1994). Pls.' Reply Br. at 18.

As Koyo correctly recognizes, the CAFC has since upheld Commerce's approach of deducting direct selling expenses from USP, stating:

> In an exporter's sales price transaction, after an initial exporter's sales price is calculated, that value is adjusted, *inter alia,* pursuant to section 1677a(e)(2) [(1988)] by deducting therefrom all selling expenses (both direct and indirect) incurred in making U.S. sales. Then, in determining an initial foreign market value, appropriate sales are identified in the home market or third country pursuant to 19 U.S.C. § 1677b(a). Next. the initial foreign market value is adjusted, *inter alia,* by deducting therefrom a "circumstances of sale" amount to account for "any difference between the United States price and the foreign market value," 19 U.S.C. § 1677b(a)(4), for example, direct selling expenses incurred in making home market sales. In this way, the section 1677b(a)(4) adjustment to foreign market value counterbalances the section 1677a(e)(2) adjustment to exporter's sales price. As a result, the two parameters may be compared on equivalent terms.

Koyo Seiko Co. v. United States, 36 F.3d at 1573 (Fed. Cir. 1994).

In light of the CAFC's decision in *Koyo Seiko,* 36 F.3d at 1565, the Court sustains Commerce's deduction of Koyo's direct selling expenses from USP as comporting with current judicial precedent.

5. *Use of Partial BIA to Calculate Constructed Value for the 1990/91 Review:*

In the 1990/91 Final Results, Commerce concluded that Koyo's transfer prices for work done by a related-party subcontractor were less than the subcontractor's cost of production.[4] Consequently, Commerce used partial BIA to calculate Koyo's transfer price portion of constructed value.[5] As partial BIA, Commerce increased Koyo's reported material costs by the average difference between reported related-party transfer prices that were below the actual cost of production ("COP") and the

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[4] When a subcontractor is a related party, the price that the manufacturer pays the subcontractor is the "transfer price." Where Commerce determines that the transfer price is not reflective of fair market price, it may disregard it and apply, as BIA, an amount that reflects what the amount would have been had the transaction occurred between unrelated persons. *See* 19 U.S.C. § 1677b(e)(2); 19 C.F.R. § 353.50(c) (1990).

[5] When Commerce bases FMV on CV, it first calculates the COM and then adds amounts for general expenses and profits. *See* 19 C.F.R. § 353.50(a) (1990). COM includes the cost of services or materials subcontracted to other manufacturers.

actual costs of production of these models. *Final Results*, 58 Fed. Reg. 64,728. Koyo disagrees.

Koyo first contends that Commerce's resort to BIA for the purpose of calculating CV was improper. Specifically, Koyo argues that because Commerce found that for two TRB models the transfer prices for work done by a related subcontractor were less than the subcontractor's cost of production, Commerce erroneously assumed that the transfer prices of the majority of the U.S. models on which CV was calculated were also below cost of production and adjusted Koyo's COM to account for the understatement. Koyo submits that its transfer prices on average *exceeded* cost of production. According to Koyo, application of BIA increased its COM, inflating CV for every U.S. product, and overstating its dumping margins every time a U.S. sale was compared to CV. Mem. Supp. Pls.' Mot. J. Agency R. at 35–36. Koyo wants its 1990/91 margins recalculated without an adjustment to COM. *Id.* at 38.

Second, Koyo claims that Commerce's choice of BIA was flawed. If Commerce is found to have properly applied BIA, Koyo proposes that the BIA factor be recalculated taking into account transfer prices above, as well as below, COP. That is, Koyo wants Commerce to determine the difference between what Koyo paid for all the models tested and what it should have paid, as a percentage of the transfer prices for all these models, not just the two models found to be below COP. *Id.* at 39–40. In addition, Koyo contends that Commerce "calculated a COM adjustment for all models based on the assumption that the facts relating to the two 'understated' models applied to *every single model* sold by Koyo in the U.S. market." *Id.* at 40. Koyo concedes that Commerce adjusted the BIA factor to limit its application to the percentage of Koyo's total costs attributable to subcontracting. However, Koyo suggests that Commerce should have further limited its application to costs attributable only to subcontracting *by related parties*. *Id.*

Defendant-intervenor, The Timken Company ("Timken"), contends that "the best measure of the proper adjustment for below-cost input prices is the difference between transfer prices and cost for those below-cost parts." Timken's Opp. Pls.' Mot. J. Agency R. at 25. Timken also asserts that "[a]bove-cost transactions have no logical relationship to the task and if used would produce an arbitrary result." *Id.*

In response, Commerce argues that its resort to partial BIA in calculating CV was justified because Koyo's reported information was inaccurate, incomplete, and misleading. Def.'s Opp. Pls.' Mot. J. Agency R. at 20.

The Court must agree with Commerce on this issue. Commerce instructed Koyo to only use related-party transfer prices to calculate costs of material if the transfer prices were higher than the related supplier's actual cost of production. *See* Public R. Doc. No. 34, Cost Questionnaire for 1990/91 review, sent to Koyo on Jan. 23, 1992, Section VI at 7–8. Koyo's use of a transfer price, therefore, implicitly represents that the transfer price is, in fact, higher than the actual cost of production.

Verification proved this not to be the case. *See* Confidential R. Doc. No. 172, Memorandum from Neal Halper to Marie E. Parker, dated Dec. 1, 1993, at 1. Therefore, even if Koyo made no misrepresentations with respect to some of the transfer prices Commerce tested and the average transfer price of the sample examined exceeded the average cost of production, the Court cannot encourage misleading reporting. To do so would defeat the point of the BIA rule, *i.e.*, to prevent respondents "from controlling the results of the investigation by providing partial information." *Pistachio Group of the Ass'n of Food Indus. v. United States*, 11 CIT 668, 679, 671 F. Supp. 31, 39–40 (1987). In addition, "[i]t is Commerce, not the respondent, that determines what information is to be provided for an administrative review." *NSK Ltd. v. United States*, 19 CIT ___, ___, 910 F. Supp. 663, 671 (1995), citing *Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986). *See also N.A.R. S.p.A. v. United States*, 14 CIT 409, 415, 741 F. Supp. 936, 941 (1990).

Koyo does not deny that, on the samples Commerce tested for reliability, transfer prices for work done by a related-party subcontractor were in fact misrepresented. Nor does Koyo offer any explanation for this deficiency. Since the sampling of reported prices examined was unreliable, Commerce reasonably abandoned confidence in the accuracy of Koyo's reported data and applied partial BIA.

Further, Commerce requested data on the *actual*, not the average, transfer prices. The Court must grant Commerce considerable deference in choosing BIA. It is within Commerce's discretion to decide what constitutes best information available in a particular case. *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191–92 (Fed. Cir. 1993), *cert. denied*, 115 S. Ct. 722 (1995). Commerce may reject respondent's data *in toto*, even if "some of it had not been proven inaccurate," if, as in this case, the information, or part thereof, proves unreliable. *Chinsung Indus. Co. v. United States*, 13 CIT 103, 109, 705 F. Supp. 598, 602 (1989). The Court will not reward Koyo by requiring Commerce to use the favorable related-party transfer prices contained in Koyo's deficient submission, notwithstanding that the deficiency did not extend to all of the transfer prices tested. If Koyo were to benefit as a result of misrepresenting its reported information, the incentive to respond accurately would be eliminated and "alleged unfair traders would be able to control the amount of antidumping duties by selectively providing [Commerce] with information." *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990); *accord Allied-Signal Aerospace*, 996 F.2d at 1190–92. In addition, Koyo points to no record evidence that would allow Commerce to fully determine which TRB models involved related-party contracting.

In sum, the Court finds that Commerce's rejection of Koyo's related-party transfer prices in favor of partial BIA, for the purpose of calculating Koyo's transfer price COM portion of constructed value, was in accordance with law.

6. *Calculating FMV on the Basis of Split TRB Sets:*

For the purpose of comparing FMV to USP, Commerce calculated FMV by splitting TRB sets sold in the home market into their component parts: individual cups and cones.[6]

Koyo complains that Commerce erred. Koyo first represents that cups and cones split from sets are not commercially comparable to individually-sold cups and cones. Koyo contends that the value of a TRB set is greater than the value of its individual parts, *i.e.*, the cup and cone components. Thus, Koyo maintains that the split set components are not "such or similar" to cups and cones sold individually in the U.S. market. *See* 19 U.S.C. § 1677(16). In support, Koyo cites *Koyo Seiko Co. v. United States*, 18 CIT ___, 861 F. Supp. 108 (1994). Lastly, Koyo claims that set splitting is a "fabrication of sales of cups and cones in the home market" in contravention of 19 U.S.C. § 1677b(a)(1).[7] Mem. Supp. Pls.' Mot. J. Agency R. at 42–43. Koyo further argues that splitting of sets was unnecessary as it had sufficient sales of cups and cones for matching in both markets. Koyo requests that Commerce be instructed not to split TRB sets sold in the home market or, at a minimum, not compare split home market sets but to rely on components sold separately in the home market. If permitted to split TRB sets, Koyo urges that Commerce be directed to make an adjustment for the difference in value between split set components and individually-sold components. *Id.* at 41–48.

Commerce responds that the splitting of TRB sets created a sufficiently large pool of potentially comparable cups and cones from which to determine FMV based on price instead of constructed value. Def.'s Opp. Pls.' Mot. J. Agency R. at 25.

Confronted with similar arguments, the Court has previously upheld Commerce's practice of splitting TRB sets to calculate FMV. *See NTN Bearing Corp. of Am. v. United States*, 18 CIT ___, ___, 881 F. Supp. 584, 590 (1994) (Commerce's set-splitting methodology discourages circumvention of the antidumping law); *NTN Bearing Corp. v. United States*, 14 CIT 623, 640, 747 F. Supp. 726, 741 (1990) (TRB component parts "such or similar" to other component parts, retain status where sold as sets); *Timken Co. v. United States*, 11 CIT 786, 794–95, 673 F. Supp. 495, 504–05 (1987).

In addition, *Koyo Seiko*, 18 CIT at ___, 861 F. Supp. at 108, does not stand for the proposition that the commercial value of a TRB set is increased simply because the two individual components are sold together. That case addressed the issue of increased value from additional material or labor and a process of assembly after importation. *Koyo Seiko*, 18 CIT at ___, 861 F. Supp. at 114–15 (placement of individual TRB components placed in a box for sale as a set increases value and requires an adjustment for further manufacturing of merchandise

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[6] A TRB set contains two component parts: the "cup" or outer ring; and the "cone" which consists of an assembly of an inner ring, a cage containing the rolling elements, and the rolling elements.

[7] 19 U.S.C. § 1677b(a)(1) provides: "In the ascertainment of foreign market value for the purposes of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account."

under 19 U.S.C. § 1677a(e)(3) (1988)). However, the record indicates that this case does not support Koyo's position. *See* Confidential Mem. Supp. Pls.' Mot. J. Agency R. at 43 n.6.

Furthermore, Commerce determined that the home market comparison merchandise was approximately of equal commercial value by comparing the variable cost of manufacturing of potential home market matches to that of the U.S. model, subject to a twenty percent limit on differences in the variable costs. To the extent that there are differences in commercial value between TRB sets and corresponding unassembled component parts, they are accounted for in Commerce's difference-in-merchandise ("difmer") adjustment by which the total cost of manufacturing the set is allocated to the component parts.

In addition, 19 U.S.C. § 1677b(a)(1) prohibits fictitious, sham or hypothetical transactions. In this case, Commerce was able to determine a foreign market value for TRB components sold as sets based upon Koyo's actual and legitimate sales in the home market. As pretended sales were not involved, Commerce could use the components in question as comparison models. *See Timken Co. v. United States,* 11 CIT at 794–95, 673 F. Supp. at 504–05.

Lastly, Commerce's selection of methodologies may be affected by general considerations in a given case, *i.e.,* discouraging control of the manner in which FMV is determined, increasing the "pool" of home market sales for possible comparison to U.S. sales. Commerce's legitimate policy choices deserve regard. *See Suramerica de Aleaciones Laminadas, C.A. v. United States,* 966 F.2d 660, 665 (Fed. Cir. 1992). A respondent's invoicing methods cannot become the predominant factor in determining the selection of comparison models. Such a result would be inconsistent with the Court's concerns identified in *NTN Bearing Corp.,* 14 CIT at 623, 747 F. Supp. at 726, and *Timken,* 11 CIT at 786, 673 F. Supp. at 495.

Therefore, the Court sustains Commerce's calculation of FMV of TRB components by allocating the sales price of the TRB sets to their individual components. *See NTN Bearing Corp.,* 19 CIT at ___, Slip Op. 96–67 at 8; *NTN Bearing Corp. of Am. v. United States,* 19 CIT ___, Slip Op. 95–1 at 11–12 (Jan. 3, 1995).

7. *Ordinary Course of Trade:*

Koyo questions Commerce's inclusion of certain small quantity sales in the home market database which Koyo claims were made outside the ordinary course of trade. *See* 19 U.S.C. § 1677b(a)(1); 19 U.S.C. § 1677(15); 19 C.F.R. § 353.46(a)(1). Many of the sales at issue were of sample products. Koyo maintains that the prices for the samples were negotiated separately from its normal sales, the sales were identified as samples when the order was taken and its sample sales have been excluded by Commerce in previous TRB proceedings. The remainder of the sales in question consist of obsolete TRB models. Koyo maintains that these products were sold at high prices because they were obsolete and inventories were maintained only to accommodate particular cus-

tomers. Koyo complains that the inclusion of these sales in calculating foreign market value increased its total potential unpaid dumping duties for these reviews. Koyo seeks their exclusion and recalculation of its dumping margins. Mem. Supp. Pls.' Mot. J. Agency R. at 48–53.

Commerce argues that Koyo's claim of sample and obsolete sales was insufficiently substantiated and it is not obliged to continue to accept Koyo's claims merely because it accepted similar unsubstantiated claims in the past. Def.'s Opp. Pls.' Mot. J. Agency R. at 36. To support its differing treatment in the instant reviews, Commerce cites *Murata Mfg. Co. v. United States,* 17 CIT 259, 263–64, 820 F. Supp. 603, 606 (1993) (the occurrence of home market sales made in low quantities and at higher prices than sales of other home market models, without further support, is insufficient to establish that the sales are outside the ordinary course of trade).

Koyo bears the burden of proving that the sales used in Commerce's calculations are outside the ordinary course of trade. *NTN Bearing Corp. of Am. v. United States,* 19 CIT ____, ____, 903 F. Supp. 62, 68–69 (1995); *Nachi-Fujikoshi Corp. v. United States,* 16 CIT 606, 608, 798 F. Supp. 716, 718 (1992).

Koyo represents that its proof that particular sales were outside the ordinary course of trade meets the *Murata* standard. Pls.' Reply Br. at 40.

The Court has held that Commerce cannot exclude sales allegedly outside the ordinary course of trade from FMV unless there is a complete explanation of the facts which establish the extraordinary circumstances rendering particular sales outside the ordinary course of trade. *NTN Bearing Corp.,* 19 CIT at ____, 905 F. Supp. at 1091. In *NTN,* the Court found that mere identification of certain sales as sample, zero price and infrequent small quantity sales, without further explanation, as is the case here, was insufficient to establish that the sales were made outside the ordinary course of trade. *Id.* at ____, 905 F. Supp. at 1090–91. More specifically, in *NTN Bearing Corp.,* 19 CIT at ____, 903 F. Supp. at 68–69, the Court rejected arguments that the intent behind the transaction, corroborated by plaintiffs' certification of factual accuracy of its reporting, sufficiently established that its sample and small quantity sales were outside the ordinary course of trade. Similarly here, evidence that sales are marked as samples when the order is taken is insufficient to support Koyo's claim. The Court has also upheld Commerce's refusal to exclude infrequent small quantity sales or sales of models at a high price to only a few customers. *See NTN Bearing Corp.,* 20 CIT at ____, Slip Op. 96–67 at 16–17.

The Court has previously adopted the position espoused in *Murata Mfg. Co.,* 17 CIT at ____, 820 F. Supp. at 607, that the determination of whether home market sales are in the ordinary course of trade requires an evaluation of not just "one factor taken in isolation but rather * * * all the circumstances particular to the sales in question." *See, e.g., NTN Bearing Corp.,* 19 CIT at ____, 905 F. Supp. at 1091; *NTN Bearing Corp.,*

903 F. Supp. at 68; *NTN Bearing Corp.*, 19 CIT at ____, 905 F. Supp. at 1091. *See also Cemex, S.A. v. United States*, 19 CIT ____, ____, Slip Op. 95–72 at 6 (Apr. 24, 1995). One of the factors which the court in *Murata* observed was found by Commerce to be probative in another administrative review is respondent's "'sales practices with respect to sample sales at the verification * * * and the [determination] that the prices of samples were negotiated separately from the standard price agreements.'" *Murata*, 17 CIT at 263, 820 F. Supp. at 606 (citing *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan, Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 4,951, 4,958–59 (1992)). The instant record, however, does no more than announce that prices for Koyo's samples were negotiated separately from normal sales; it does not demonstrate it. *See* Confidential R. Doc. No. 9, Koyo 1990/91 Questionnaire Response, dated March 27, 1992, Section V at 8; Confidential R. Doc. 9 at 8–9, Koyo 1991/92 Questionnaire Response, dated March 30, 1993, Section V at 8–9. Therefore, in this case, this factor is unpersuasive.

In addition, Commerce's treatment of sales in another proceeding is irrelevant to this case. The Court has recognized that Commerce's determinations must be individually examined, taking into account all of the relevant facts of each case. *NTN Bearing Corp.*, 19 CIT at ____, 905 F. Supp. at 1091.

Accordingly, the Court upholds Commerce's inclusion of Koyo's small quantity sample sales and sales of obsolete TRB models in the home market data base used to determine foreign market value.

CONCLUSION

This case is remanded to Commerce to allow it to recalculate adjustments for U.S. discounts and sales allowances using customer-specific data reported by Koyo. The Final Results are sustained as to all other issues raised by Koyo.

(Slip Op. 96–102)

EXPANCEL, INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 93–08–00492

[Defendant's motion for summary judgment is granted. Plaintiff's motion for summary judgment is denied. Judgment entered for defendant.]

(Dated June 21, 1996)

Ober, Kaler, Grimes, and Shriver (Peggy Chaplin, John F. Morkan, III, and *George H. Falter, III),* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Civil Division, United States Department of Justice *(John J. Mahon);* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Edward N. Maurer),* of counsel, for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* This matter is before the Court on the parties' cross-motions for summary judgment. Defendant claims that the United States Customs Service ("Customs") properly classified the subject merchandise as "[a]crylic polymers in primary forms: * * * Other: * * * Other: Plastics" ("acrylic polymers that are plastics"), under subheading 3906.90.20, HTSUS, with a duty rate of 6.3 percent. Plaintiff claims that Customs should have classified the subject merchandise as "[a]crylic polymers in primary forms: * * * Other: * * * Other: * * * Other" ("other acrylic polymers"), under 3906.90.50, HTSUS, with a duty rate of 4.2 percent. The Court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988) and enters judgment in favor of defendant.

BACKGROUND

This case involves the classification, for customs purposes, of extremely small, acrylic polymer spheres ("microspheres") that entered the United States in 1992. The microspheres cumulatively look like powder to the naked eye. The powder is added to other substances, such as ink and paint, to change the weight and texture of those substances.

The parties agree that the subject microspheres are manufactured using a suspension polymerization process. In this process, hydrophobic monomers are mixed with water and isobutane. The hydrophobic monomers collect and form droplets. When heat is applied, the droplets form spherical, acrylic polymer shells encapsulating isobutane. When the heat is removed, the microspheres retain their shape.

If additional heat is applied to the microspheres, the isobutane and spherical shells expand. Eventually, the microspheres can grow to about 40 times their original size, so that each microsphere has a diameter of about 35 microns. When the additional heat is removed, the microspheres retain their expanded size.

If the isobutane is removed from within the microspheres, the microspheres may collapse because they are so small, and their walls are so thin, that they cannot support themselves. The microspheres do not, however, revert to the state that they enjoyed prior to suspension polymerization or heating.

DISCUSSION

When faced with a motion for summary judgment, the Court determines whether a case presents any genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). If the case lacks genuine issues of material fact, and the moving party is entitled to judgment as a matter of law, then the Court may grant summary judgment. USCIT Rule 56(d).

Customs' classification of the subject microspheres as acrylic polymers that are plastics enjoys a statutory presumption of correctness. 28 U.S.C. § 2639(a)(1) (1988). Plaintiff bears the burden of overcoming this initial presumption. *Id.* To determine whether plaintiff can overcome the presumption in favor of Customs, the Court will first consider

whether the classification applied by Customs describes the subject microspheres. *Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). The Court will then consider whether the classification proposed by plaintiff better describes the microspheres. *Id.*

A. *Customs' Classification of the Subject Microspheres as Acrylic Polymers that are Plastics:*

Plaintiff and defendant agree that the subject microspheres are acrylic polymers in primary forms.

Plaintiff claims, however, that Customs erred by further classifying the microspheres as acrylic polymers that are plastics. Plaintiff points out that applicable chapter notes define "plastics" as certain "materials" which are capable, at or after the moment of polymerization, of undergoing a process whereby external influence, such as heat and pressure, forms them into "shapes" which are retained on the removal of the external influence. *Notes to Ch. 39 of the HTSUS* (1992). Plaintiff claims that this definition requires a material to be capable of being formed into various "shapes," such as pyramids, cubes, and spheres, in order to be classified as plastic. Because the subject items are only formed into one shape, that of a sphere, during suspension polymerization, plaintiff claims that the items cannot be classified as acrylic polymers that are plastics. The Court disagrees.

The definition of "plastics" given in the binding chapter notes is simply written in plural form. It describes "materials" which, under certain circumstances, are capable of being formed into "shapes." It does not require a particular material to be capable of being formed into "various," "assorted," or "different" shapes in order to be classified as plastic.

Upon review, the Court finds that the subject microspheres fall within the relevant definition of "plastics" because at or after the moment of polymerization, they undergo a process whereby heat causes them to form shapes which are retained upon the removal of the heat. First, at the moment of polymerization, heat externally influences droplets of monomers, causing them to form spherical polymer shells around isobutane. These shells retain their spherical shape after the heat dissipates. Second, if additional heat is applied after the moment of polymerization, the shells expand to more than 40 times their original size. Again, the microspheres retain their expanded shape when the heat is removed.

Moreover, the Court notes that the microspheres are commonly and commercially referred to as "plastics." This is illustrated by plaintiff's own documents. For example, one of plaintiff's documents is entitled, "EXPANCEL Thermo*plastic* Microspheres" (emphasis added). Another document explains, "EXPANCEL microspheres are thermo*plastic* hollow spheres" (emphasis added). In light of these admissions, plaintiff's claim that the microspheres cannot be described as "plastics" appears disingenuous. The Court finds that the subject microspheres are classifiable as acrylic polymers that are plastics.

B. *Plaintiff's Proposed Classification of the Subject Microspheres as Other Acrylic Polymers:*

Having determined that the subject microspheres can be classified under the subheading for acrylic polymers that are plastics, the Court turns to consider the classification proposed by plaintiff. Plaintiff claims that Customs should classify the subject microspheres as other acrylic polymers. Defendant agrees that the subject microspheres can be described as "other acrylic polymers." Defendant asserts, however, that the microspheres should not be classified as such because they are more specifically described as "acrylic polymers that are plastics."

When an article is described by more than one provision of a tariff act, it is to be classified under the provision that describes it most specifically. *HTSUS Gen. Rule of Interpretation* 3(a) (1992). The Court will only classify merchandise under a basket provision, such as the subheading for other acrylic polymers, when no other provision describes it more specifically. *Regaliti, Inc. v. United States*, 16 CIT 407, 408 (1992).

As discussed above, the Court finds that the subheading for acrylic polymers that are plastics describes the subject microspheres. This subheading describes the subject microspheres more specifically than the subheading for other acrylic polymers because it specifies that the acrylic polymers must be plastic. Consequently, the Court finds that the subject microspheres should not be classified under the basket provision for other acrylic polymers.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that plaintiff's motion for summary judgment is denied. Judgment will be entered accordingly.

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